2015 IL App (3d) 130762-U

Order filed June 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KOTARA, LLC and BRAIDKOT, LTD., Defendants-Appellants, (Claypool Drainage and Levee District, Great Lakes Bank, N.A., Nonrecord Claimants, and Unknown Owners, generally, Non-appealing Defendants).	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois Appeal No. 3-13-0762 Circuit No. 07-ED-8 Honorable Raymond E. Rossi, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: In condemnation case filed by Illinois Department of Transportation (IDOT), trial court did not err in (1) precluding defendants from presenting evidence that they were required to obtain a variance following IDOT's taking, (2) refusing to determine ownership of property where IDOT stipulated that defendant's property, for purposes of valuation, included disputed portion. Trial court erred in (1) precluding defendants from

presenting any testimony or evidence regarding the valuation, and (2) granting summary judgment to IDOT.

¶ 2 The Department of Transportation of the State of Illinois (IDOT) filed a complaint to condemn certain commercial real estate owned by defendants Kotara, L.L.C. and Braidkot, Ltd. for the improvement of a state highway. While the complaint was pending, defendants filed a motion for declaratory judgment, seeking a declaration from the court that it owned a total of 2.05 acres of land. The court denied the motion. Prior to trial, both IDOT and defendants filed numerous motions *in limine*, seeking to bar evidence and testimony. The trial court granted several of IDOT's motions *in limine*, effectively barring all of defendants' valuation evidence. IDOT then filed a motion for summary judgment, which the trial court granted. Defendants appeal the trial court's rulings on the parties' motions *in limine*, their motion for declaratory relief, and entry of summary judgment in favor of IDOT. We reverse and remand.

¶ 3 In March 2007, IDOT brought suit against defendants and others to condemn certain real estate under the state's eminent domain power in connection with plans to improve State Route 113 in Will County. Defendants' property is located along East Main Street (State Route 113) in Braidwood and consists of approximately two acres of land containing a single-story 19,000-square-foot grocery store and 96-vehicle parking lot. IDOT's proposed reconstruction of Route 113 requires a fee simple taking of approximately .120 acres of defendant's property, a permanent easement consisting of .116 acres, and a temporary construction easement of .064 acres.

¶ 4 At the time of the taking, defendants were operating their grocery store as a legally nonconforming property because it had inadequate parking under the Braidwood City Code. IDOT's condemnation would eliminate an additional 19 parking spaces from the property. With

respect to nonconforming uses and buildings, the Braidwood City Code provides in pertinent part:

> "Any use, building or structure lawfully existing or under construction * * * which does not conform to the provisions of this title or amendment shall be nonconforming. Any such nonconforming building, structure or use may be continued subject to the following provisions, maintained through ordinary repair, or changed to conform to the applicable zoning district regulations. A nonconforming use shall not be (1) expanded or extended into any other portion of a site * * * nor (3) changed to another nonconforming use." Braidwood City Code, § 1.8 (2005).

If a nonconforming use is expanded or extended into another portion of a site or changed to another nonconforming use, the property owner must seek and obtain a variance from the City.

¶ 5 Both IDOT and defendants hired certified general real estate appraisers to value the property. Charles Southcomb issued the original valuation report for IDOT in 2007. He determined that the fair market value of the entire property was $910,000, and the fair market value of the property taken was $42,000. He concluded that the damage to the remainder was $63,000, and the compensation due for the permanent and temporary easements was $42,200. He opined that the total compensation due defendants was $147,200. In making his valuation, he used the comparable sales approach, using values from the sales of five properties containing retail stores, four of which were grocery stores.

¶ 6 Francis Lorenz issued a report for IDOT. He determined that the market value of the whole property was $1,270,000, the market value of the property taken in fee simple was $47,000, and the market value of the permanent easement was $45,500. He found that the

damage to the remainder caused by the taking was $32,500, and the damage caused by the temporary easement was $7,000, for a total of $132,000 in damage to the property. In valuing the property as a whole, he used the comparable sales approach, utilizing five comparable sales of property containing retail stores. Lorenz stated that "[t]he loss of 19 parking spaces of the 96 spaces on site prior to the takings represents a significant loss of capacity." He concluded that because the " 'lost' spaces are primarily customer spaces, the loss of parking spaces * * * will have an adverse effect on the value of the remainder."

¶ 7 Douglas Adams also issued a report for IDOT. He determined the fair market value of defendants' entire property to be $1,100,000, and the fair market value of the property taken in fee simple to be $37,000. He found that the damages to the remainder were $38,000, including $33,000 for costs to cure. Finally, he determined that the compensation due for the permanent and temporary easements was $42,000, for a total compensation due of $117,000. In valuing the property, he used the comparable sales method, using five properties with buildings housing retail and/or grocery stores. He concluded that "[a]fter the taking, the remainder property will still function as a grocery store * * *. However, its overall access and maneuverability, both customer vehicles and delivery truck vehicles through the property will be affected and several items will have to be relocated."

¶ 8 Patricia McGarr issued a report for defendants. She found that the market value of the entire property was $1,360,000, the market value of the part taken as fee simple was $47,000, the market value of the part taken as a permanent easement was $39,000, and the market value of the temporary easement was $7,200. She determined that the damages to the remainder caused by the taking were $331,000, and the damages to the remainder caused by the temporary easement were $45,800, for a total loss of $470,000 to defendants. She utilized the comparable sales

approach to value the property, comparing six sales of properties containing supermarkets. McGarr determined that "[a]fter the taking, the highest and best use of the site has been impacted." She concluded that the property could be "considered a second-tier grocery store because of the functional deficiency caused by the loss of so much needed parking on-site and the awkward traffic flow on site after the taking."

¶ 9 David White also issued a report for defendants. According to his report, the market value of the entire property was $1,362,000, the market value of the property taken in fee simple was $45,000, the market value of the permanent easement was $42,000, and the market value of the temporary easement was $47,500. He determined that the damage to the remainder consisted of $353,000, for a total loss in value of $487,500. In calculating the fair market value of the property, White used the comparable sales approach, utilizing five sales of property upon which grocery or retail stores were situated. He determined that the highest and best use of the property after the taking continued to be a grocery store but noted that "[t]he parking lot will require reconstruction to include a reconfiguration to accommodate the single drive entrance and the loss of nineteen parking spaces."

¶ 10 Both parties also hired engineers to provide plans for reconfiguring defendants' parking lot after the taking. The engineer hired by defendants, Joe Zgonina, developed a site plan with 73 parking spaces. IDOT's engineer, Dennis Huffaker, prepared multiple site plans with the number of parking spaces ranging from 97 to 110.

¶ 11 In November 2009, defendants filed a variance petition with the City seeking approval of the site plan prepared by Zgonina. The City's planning and zoning board denied the petition. Thereafter, McGarr and White prepared amended appraisal reports assuming that a variance was required but not granted to defendants. Under those circumstances, McGarr determined that

defendants would have to adapt the property for another commercial use and likely reduce its size so that it would comply with the City's zoning requirements. In that case, defendants would be entitled to $891,900 in just compensation. White determined that with no variance, the highest and best use of the property after the taking would be as vacant land that could be redeveloped for another commercial use. White determined that defendants would be owed $944,500 for their property as a result of IDOT's taking under those circumstances.

¶ 12 In December 2010, defendants submitted to the City an engineering plan created by Huffaker with 102 parking spaces. The City denied defendants a variance based on that plan.

¶ 13 In April 2011, IDOT filed a motion for a ruling that the whole area of defendants' property for purposes of determining fair market value consisted of 2.05 acres. IDOT asserted that defendants actually held record title to only 1.929 acres but were using .076 acres of property they did not own, referred to as the "disputed area," as a portion of its parking lot. Defendants filed a response arguing that they owned the "disputed area." Defendants asked the court to either (1) deny IDOT's motion, or (2) declare that they own 2.05 acres, including the "disputed area." Thereafter, defendants filed a motion for declaratory judgment, seeking a determination that they own the entire 2.05 acres. The trial court denied plaintiff's motion for a ruling on the size of defendants' property and denied defendants' motion for declaratory judgment.

¶ 14 Before trial, both parties filed many motions *in limine*. Defendants' motion *in limine* number 22 sought to preclude IDOT's experts from testifying "to their opinions of the value of the remainder and damage thereto." Defendants argued that IDOT's experts assumed that defendants' property can continue to operate as a grocery store, which it cannot do without a variance. Defendants reasoned that since there is not a reasonable probability that they will

obtain a variance, IDOT's valuation opinions are inadmissible. Defendants' motion *in limine* number 23 sought to preclude IDOT's witnesses from testifying about Huffaker's engineering plans and opinions because IDOT failed to establish that a reasonable probability exists that a variance will be granted based on those plans.

¶ 15 IDOT's motion *in limine* number 2 sought to bar defendants' appraisers from testifying or presenting any valuation evidence. According to IDOT, McGarr's and White's opinions are based "on an improper methodology" and "speculation" "that the property has to be razed as a result of the taking." IDOT's motion *in limine* number 3 sought to "bar any evidence, testimony, or opinions regarding the need and requests for a variance because this evidence is not relevant, admissible or reliable." IDOT's motion *in limine* number 4 sought to bar all testimony and evidence attempting to interpret the City's Code. IDOT's motion *in limine* number 8 sought to bar evidence of a letter written by Braidwood City Attorney Scott Pyles to Braidwood's Mayor, William Rulien, in which Pyles opined that defendants must obtain a variance to continue to operate their grocery store, or be subject to penalties. Finally, IDOT's motion *in limine* number 9 sought to bar opinions from defendants' appraisers that defendants were entitled to more just compensation because of the "disputed area."[1]

¶ 16 In November 2011, the trial court ruled as a matter of law that defendants were not required to obtain a variance in order to operate their grocery store after IDOT's taking. As a result, the court granted IDOT's motions *in limine* numbers 3, 4 and 8. Thereafter, the trial court

[1] McGarr determined that defendants were due $572,000, and White set just compensation at $571,500, considering IDOT's taking and defendants' loss of the "disputed area".

granted IDOT's motions *in limine* numbers 2 and 9, precluding all evidence and testimony from defendants' appraisers as to the just compensation defendants were due.

¶ 17 Since defendants had no evidence to present regarding valuation, IDOT filed a motion for summary judgment. The trial court granted the motion and entered a just compensation award for defendants in the amount of $165,500.

¶ 18 ANALYSIS

¶ 19 I. Evidence regarding variance

¶ 20 Defendants first argue that the trial court erred in granting IDOT's motions *in limine* numbers 3, 4 and 8, thereby eliminating any evidence regarding defendants' alleged need for and inability to obtain a variance for their property after the taking. They further contend that the court erred in denying its motions *in limine* numbers 22 and 23, which sought to prevent IDOT's valuation experts from testifying and presenting evidence since they did not consider defendants' need for and inability to obtain a variance in reaching their valuation opinions.

¶ 21 Normally, we review a trial court's decision on a motion *in limine* for an abuse of discretion. *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 76. However, where the issue involves a question of law, our standard of review is *de novo*. *Id.*

¶ 22 The owner of property condemned for public use is entitled to just compensation for the taking of his land. *People ex. rel. Department of Transportation v. Birger*, 155 Ill. App. 3d 130, 134 (1987). Just compensation is determined by looking at the fair market value of the property for its highest and best use on the date of the filing of the condemnation petition. *Id.* Both parties have the right to adopt their own theory as to the highest and best use of the land taken. *Id*.

¶ 23 A jury may consider the reasonable probability of a zoning change in determining the highest and best use of property. *Department of Public Works & Buildings v. Exchange National Bank*, 31 Ill. App. 3d 88, 105 (1975). It is for the court to make the preliminary determination of whether there is sufficient evidence of a reasonable probability of rezoning to permit witnesses to testify to market value based on such a probability. *Lombard Park District v. Chicago Title & Trust Co.*, 103 Ill. App. 2d 1, 9 (1968). If there is sufficient evidence of a reasonable probability of rezoning, it is for the jury to determine the weight to give such expert's conclusions as to value. *Id*. If the court determines that the evidence falls short, as a matter of law, of showing a reasonable probability of rezoning within the reasonably near future, it must then exclude all evidence and opinions of value based upon a use permitted only by rezoning. *Id*.

¶ 24 A witness may not be offered solely to render an expert opinion as to whether or not a legislative body will grant a rezoning. *Id*. at 11; *Forest Preserve District of Du Page County v. Kelley*, 69 Ill. App. 3d 309, 320 (1979). However, a witness offered as a valuation expert may in the course of explaining the basis for his determination, testify to a reasonable probability of rezoning if such is a factor in arriving at his valuation opinion, and if warranted by the matters in evidence suggesting a basis for such rezoning. *Lombard Park District*, 103 Ill. App. 2d at 11.

¶ 25 One test of the admissibility of an expert witness' testimony is whether there is sufficient evidence to serve as a foundation for the expert's opinion. *In re Saline Branch Drainage District*, 19 Ill. App. 3d 125, 132 (1974). When a foundation is lacking and the opinion of the expert amounts to speculation and conjecture, it should be excluded. *Id*.

¶ 26 Here, there was conflicting evidence about whether defendants would be required to obtain a variance for their property after the taking. The trial court determined, as a matter of law, that no variance was necessary because a reduction in the number of spaces available for

parking did not cause defendants' nonconforming use to be "expanded or extended into any other portion of a site *** nor *** changed to another nonconforming use." See Braidwood City Code, § 1.8 (2005). We agree with the trial court's determination on this question of law. While the reduction of parking spaces caused by IDOT's taking increases defendants' nonconforming use, it does not extend it into any other portion of defendants' property or change it to another nonconforming use.

¶ 27 Moreover, even if defendants were required to obtain a variance, any evidence, testimony or opinions premised on the assumption that defendants will not obtain a variance is improper because it is based on speculation and conjecture. See *In re Saline Branch Drainage District*, 19 Ill. App. 3d at 132. The trial court properly precluded any evidence regarding defendants' alleged need for and inability to obtain a variance by granting IDOT's motions *in limine* numbers 3, 4 and 8, and denying defendants' motions *in limine* numbers 22 and 23.

¶ 28 II. Defendants' valuation evidence

¶ 29 Defendants next argue that the trial court erred in granting IDOT's motion *in limine* number 2, which precluded defendants' appraisers from presenting any evidence or testimony regarding the just compensation due defendants as a result of IDOT's taking.

¶ 30 As a general rule, a party is entitled to present evidence which is relevant to its theory of the case. *People ex rel. Department of Transportation v. Kotara, L.L.C.*, 379 Ill. App. 3d 276, 286 (2008). Both parties in a condemnation proceeding have the right to present their own evidence and testimony regarding the value of the land taken. See *Birger*, 155 Ill. App. 3d at 134. A witness is competent to testify as to the value of real property if it appears that the witness has some peculiar means of forming an intelligent and correct judgment as to the value of the land in question beyond what is presumed to be possessed by people generally.

Department of Public Works & Buildings v. Oberlaender, 42 Ill. 2d 410, 414 (1969). A real estate appraiser qualifies as a competent valuation witness. See *id*.

¶ 31 A party's objection to the testimony of an opposing expert on the basis that the expert's testimony includes improper elements or adopts a different theory of valuation goes to the weight, rather than the admissibility, of the testimony. See *In re Matter of Village of Bridgeview*, 139 Ill. App. 3d 744, 749-50 (1985); *Department of Transportation v. Mullen*, 120 Ill. App. 3d 268, 276 (1983); *Department of Public Works & Buildings v. Tally*, 125 Ill. App. 2d 220, 224 (1970). The weight to be attached to an expert's opinion is a question for the jury in light of the facts upon which he bases his opinion and any limitations placed thereon during cross-examination. *Nicte-Ha v. Teichert*, 119 Ill. App. 2d 336, 347 (1970).

¶ 32 When a trial court makes erroneous rulings regarding the admission of evidence, reversal is required if the evidence improperly excluded was sufficiently prejudicial to change the outcome of the trial. See *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 250 Ill. App. 3d 665, 673 (1993). The improper admission or exclusion of value evidence in condemnation cases does not constitute reversible error as long as there are witnesses and evidence as to value on both sides. *Department of Transportation v. Bolis*, 313 Ill. App. 3d 982, 986 (2000).

¶ 33 Here, the trial court excluded all of defendants' valuation witnesses from testifying and presenting evidence. This was an abuse of the court's discretion.

¶ 34 IDOT argued that the reports prepared by defendants' appraisers were inadmissible because they were based on "an improper methodology" and speculation "that the property has to be razed as a result of the taking." However, neither of these claims is supported by the record. Like defendants' appraisers, White and McGarr used the sales comparison approach, a

proper valuation method, in determining a value for defendants' property. See *Board of Education of Ridgeland School District No. 122, Cook County v. Property Tax Appeal Board*, 2012 IL App (1st) 110461, ¶ 28 (sales comparison approach preferred method of property valuation). Furthermore, in their initial evaluation reports, both White and McGarr found that the highest and best use of the property was to continue as a grocery store and determined the damage to the property based on that use.[2]

¶ 35 To the extent that IDOT finds flaws in defendants' expert valuation opinions, those flaws go to the weight, not the admissibility of the evidence. See *Strickland*, 139 Ill. App. 3d at 749-50; *Mullen*, 120 Ill. App. 3d at 276; *Tally*, 125 Ill. App. 2d at 224. The proper way for IDOT to contest those opinions is through cross-examination. See *Nicte-Ha*, 119 Ill. App. 2d at 347.

¶ 36 The trial court's exclusion of defendants' experts was prejudicial because it left defendants with no evidence of value to present to the court. The trial court's improper exclusion of defendants' experts, pursuant to IDOT's motion *in limine* number 2, constitutes reversible error. See *Bolis*, 313 Ill. App. 3d at 986; *Illinois State Toll Highway Authority*, 250 Ill. App. 3d at 673.

¶ 37 III. Declaratory judgment

¶ 38 Defendants next argue that the trial court erred in denying their motion for declaratory judgment, which sought a judicial declaration that they owned 2.05 acres of property, including the "disputed area."

[2] While White determined in his amended report that the highest and best use of defendants' property after the taking would be as vacant land, that conclusion was based on his assumption that a variance would be required but not obtained by defendants. Since that assumption is speculative, both his and McGarr's amended reports were properly barred when the court granted IDOT's motion *in limine* number 4.

¶ 39 Here, IDOT stipulated that the size of defendants' property for purposes of valuation was 2.05 acres, which included the "disputed area." Since there was no disagreement between the parties regarding the size of the property valued in the eminent domain proceeding, there was no need for the trial court to judicially declare the size of the property. The trial court did not err in denying defendants' motion for declaratory judgment regarding ownership of the "disputed area."

¶ 40 IV. Summary judgment

¶ 41 Finally, defendants contend that the trial court erred in granting IDOT's motion for summary judgment.

¶ 42 Summary judgment is proper only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *City of Moroa v. Illinois Central R.R.*, 229 Ill. App. 3d 503, 505 (1992). Summary judgment is a drastic remedy allowed only when the moving party's right is clear and free from doubt. *Id*. A motion for summary judgment should be granted only when the evidence, construed most strongly against the movant, clearly establishes the movant's right to summary judgment. *Flick*, 151 Ill. App. 3d at 841.

¶ 43 Here, the trial court granted summary judgment after excluding all valuation evidence from defendants. As set forth above, the trial court abused its discretion in precluding all of defendants' valuation opinions and testimony. As such, there is a question of fact regarding the value of the taking. Since a genuine issue of material fact exists, the trial court erred in granting summary judgment to IDOT.

¶ 44 The judgment of the circuit court of Will County is reversed and the cause is remanded.

¶ 45 Reversed and remanded.