IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE,
A Municipal Corporation,
Petitioner-Appellee,
vs

No. 35,261
Bernalillo County
D-202-CV-2013-05649

SMP PROPERTIES, LLC and
R. MICHAEL PACK,
Respondents-Appellants,

and

MODERN WOODMEN OF AMERICA, et al.,
Respondents.

REPLY BRIEF

Civil Appeal From the Second Judicial District Court
County of Bernalillo
The Honorable Nancy J. Franchini
District Court Cause No. D-202-CV-2013-05649

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NOTE: Oral Argument Requested

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ARGUMENT

In general terms, the Petitioner-Appellee's ("City") Response to Brief in Chief ("Answer Brief") appears to ignore, or at least limit, some basic established principles of condemnation law in New Mexico. To the extent the City does so in its Answer Brief, Respondent-Appellants, SMP Properties, LLC and R. Michael Pack (collectively "SMP Properties") take exception to the City's assertions. SMP Properties submit that many of the controlling New Mexico case law principles of condemnation are as follows:

1. In order for an owner of private property to be compensated, an actual taking of the property is not required. It is sufficient if there are consequential damages and that such damages affect some right or interest which the owner enjoys and which is not shared or enjoyed by the public generally. *Public Service Co. of N.M. v. Catron;* 1982-NMSC-050, 98 N.M. 134, 136, 646 P.2d 561, 564; *Board of County Com'rs Lincoln County v. Harris*, 69 N.M. 315, 366 P.2d 710 (1961).

2. Under some circumstances, a "taking" may occur before an order authorizing preliminary entry becomes effective - *e.g.*, when and if the condemnor actually enters upon the property, interferes with the owner's enjoyment, and devotes the property to public use for more than a momentary period. *County of Dona Ana vs. Bennett*, 116 N.M. 778, 712, 867 P.2d 1160, 1164 (1994); *City of*

Albuquerque vs. Chapman, 77 NM 86, 89, 419 P.2d 460, 462 (1966).

3. A "taking" is complete where the entry is made upon property by the condemnor and an act is committed which indicates an intent to appropriate the property. *Chapman, Id. at* 77 N.M. 89, 90, 419 P.2d 462-463.

4. Consequential damages such as lost profits or lost rents are awardable as compensation for a taking in an inverse condemnation proceeding. *Primetime Hospitality, Inc. v. City of Albuquerque,* 2009 NMSC 011, ¶2, 206 P.3d 112; *El Paso Electric Co. v. Pinkerton*, 96 N.M. 473, 632 P.2d 350 (1981); *Board of County Com'rs Lincoln County v. Harris,* 69 N.M. 315, 355 P.2d 710 (1961).

5. In condemnation proceedings, in the event of a partial taking, damages suffered to the uncondemned portion of a parcel of land, caused by the loss of use of the condemned portion, are awardable to the owner. *Campbell v. United States,* 266 U.S. 368, 45 S.Ct. 115, 69 L.Ed. 328 (1924), *in accord, City of Albuquerque vs. Westland Development Co., Inc.*, 1995-NMCA-136, 21 NM 144, 149, 909 P.2d 25, 30.

Relevant Facts:

The City in its Answer Brief omits many of the relevant facts of this case. This appeal stems from the granting of a partial summary judgment. SMP Properties advocate that a complete review of the facts in this case is extremely important. SMP Properties submit that most, if not all, of the relevant facts are

contained in the record in SMP Properties' Statement of Material Facts, and their Designation of Exhibits to Statement of Material Facts, at 2 RP 354-378 & 400-422. SMP Properties invite the Court's review of the significant facts in this case, as contained in the preceding references. These references, in summary, set forth the following facts:

a. The reason the City's Representative, Mr. Willis, went to visit the property (not to negotiate its purchase) was only to obtain the telephone number of Michael Pack. [2 RP 405, Willis Depo. p.21]

b. Mr. Willis was not seeking Mr. Pack's telephone number for purposes of negotiating the acquisition of the condemned land, but to provide him with notice of the fact that the City was going to take a portion of his property. [2 RP 407, *Id.* pp.38-40]

c. At the time of tenant (SAIA) contact, Mr. Willis told the SAIA site Manager, Mr. Russell, that the City was going to be"cutting a road through part of this property" where the SAIA fuel tanks were located, and which would also prevent SAIA from "backing trailers" up to the four end doors of the terminal. [2 RP 412, 404, Russell Depo. p.8, Willis Depo. pp.20-21]

d. The record clearly references numerous times the high cost of the installation of the fuel tanks, the long term tenant plans of SAIA to stay, and the binding promises exchanged between SAIA's Senior representative, Tom Davis,

and Mr. Pack, confirming the renewal of the subject Lease. [2 RP 368-370, Davis Depo. pp. 34-39, 1 RP 219, Pack Depo. pp. 37-40] Succinctly, SAIA and SMP Properties had mutually covenanted to renew the lease. [2 RP 370-373, Id. Davis Depo.]

e. The documents evidencing the renewal of the lease were being drafted and were in the final stage of execution at the time of the City's contact with the SAIA manager at the property. [2 RP 414-415, Id. Davis Depo.]

f. Mr. Davis, as a senior representative of SAIA, perceived that the taking by the City would restrict SAIA's free use of the leased property, namely due to the required removal of its tanks, and the impacting on SAIA's operation of four rental docks. [2 RP 375, *Id.* Davis Depo.]

g. SAIA informed SMP Properties of SAIA's intent to terminate the lease because the City's **"taking will have a serious adverse affect on our ability to operate from the terminal."** [SAIA letter 2 RP 361, Davis Depo.]

h. Due to the condemnation by the City, SAIA changed its mind about staying at the property. Had there been no notification of the condemnation, SAIA would have stayed at the property. [2 RP 374, 376, *Id.* Davis Depo.]

i. R. Michael Pack, owner, provided evidence and testimony regarding the effect of the SAIA lost lease income on the diminution of the fair market value of the property. Mr. Pack clearly explained in his Affidavit that the subject

terminal's fair market value is established by the process known as "the determination of value by income capitalization." Mr. Pack pointed out that this method involves the analysis of net rental collections to project a fair market value by applying a capitalization rate (a market specific discount yield rate). In plain terms, Mr. Pack stated that the loss of the (SAIA) lease income caused his property to suffer a "substantial diminution in value, *i.e.*, as to its "fair market value." [Pack Affidavit ¶¶5, 6, 9, 11 and 12. [2 RP 461-464] Mr. Pack's statements are contrary to the assertion by the City at AB 20 that Mr. Pack's testimony would be to the effect that the loss of the SAIA rents were only personal to him. Also, the City's cite to "RP 425" at AB 20 is not a cite to testimony or fact, but rather only a characterization of the City's opinion.

I. Reply to Specific Arguments and Authorities by the City:

At AB 7, the City argues that the mere general knowledge of a project created by a public airing, coupled with the explanation of possible associated development plans, does not give rise to a valid inverse condemnation claim. Apparently, says the City, this view defeats SMP Properties' claims because inverse condemnation damages require intentional acts, and therefore, such damages "must be the result of the public entities deliberate taking or damaging to the property in order to accomplish a public purpose." In support, the City cites to *Electro-Jet and Manufacturing Co. v City of Albuquerque*, 1992-NMSC-060, 114

NM 676, 845 P.2d 770. The City, however, misreads *Electro-Jet*. In *Electro Jet* the New Mexico Supreme Court explains what is meant by a "deliberate taking or damaging of property." The Supreme Court opines that this statement arises from the need in condemnation cases to differentiate between the awarding of compensation resulting from the exercise of the power of eminent domain, verses awarding compensation resulting from some form of tortiuous conduct or common law action for damages. Under *Electro Jet*, a property owner may not recover under inverse condemnation for damages caused by acts of carelessness or neglect on the part of a public entity. Rather, there must be "the intentional or purposeful expropriation or appropriation of private property for a public use or convenience", *i.e.* there is a distinction between a deliberate taking with damages by the exercise of eminent domain, and damages arising from tortiuous conduct. *Id*, 774, 775. The *Electro Jet* facts involved negligent acts by the City which were not compensable under inverse condemnation because such acts did not entail a deliberate-eminent domain act or process. SMP Properties submit that the obvious context of the visit by Mr. Willis described above consisted of deliberate acts in furtherance of eminent domain by the City. The acts and conduct of Mr. Willis were <u>not</u> the result of negligence or tortiuous conduct. Therefore, Mr. Willis' eminent domain conduct in contacting the SAIA tenant was a "deliberate act" under the precepts of *Electro-Jet.*

At AB 7, the City, in citing to the treatise *11 Eugene McQuillin, The Law of Municipal Corporations,* §32.26 (2010), is correct in arguing that there must be more than "mere manifestations of intent to take" to constitute a taking; instead, it requires some direct restriction on the use of the subject property. SMP Properties does not dispute this premise. SMP Properties' dispute is as to the characterization by the City regarding the conduct of Mr. Willis when he contacted the SAIA tenant. The City tries to soften Mr. Willis' conduct as being some sort of negotiating act or power point like presentation to explain the City's intent, in compliance with New Mexico law. This is not the case. As outlined in the facts above, Mr. Willis went out and told the SAIA tenant where the City was going to cut a road and showed where the road would be. Because of the described location, it was established that the proposed road went through the middle of SAIA's two fuel tanks, with the additional consequence that it impacted significantly on the ability of SAIA to "back" its semi-trailers up to four of its loading docks. In simple terms, Mr. Willis informed SMP Properties' tenant that the City was going to impose, by a taking, a drastic restriction on the use and enjoyment of the subject property by SMP Properties' tenant, SAIA. SMP Properties submit that any interference in the use and enjoyment of SAIA's tenancy is an interference in the use and enjoyment by SMP Properties of its land.

The City, at AB 9 & 10, attempts to characterize SMP Properties' arguments under the case of *Santa Fe Pacific Trust*, 2014-NMCA-93, 336 P.3d, 232 ("*SFPT*") as being that "any contact" with a tenant is sufficient to support an inverse condemnation claim. SMP Properties does not assert that any contact with a tenant supports an inverse condemnation claim. SMP Properties asserts that in this case, due to the specific conduct and statements of the City's representative, Mr. Willis, in his contact with the SAIA manager, created a clear perception in the eyes of SAIA that the City's contemplated condemnation would substantially interfere with its use and operation at the property as a tenant. Such conduct by Mr. Willis created the clear perception of a concern, even a fear, that there would be a substantial limitation on SAIA's use of the subject property. This perception caused SAIA to not renew its lease at a time when both the landlord and tenant had already covenanted that the lease would be renewed. The failure of SAIA to renew the Lease, due to the conduct of the City, led to clear economic damages (loss of rents) and diminution in the value of the subject property. These acts by the City satisfy the test of *SFPT*. Of note is that under the Supreme Court case of *City of Santa Fe v. Komis*, 1992-NMSC-051, 114 NM 659, 845 P.2d 753, a perception or fear, regardless of its reasonableness, if it results in an economic loss to property, is compensable under inverse condemnation proceedings.

The City, at AB 10 & 11, makes the thin argument that because NMSA 1978, §42A-1-4 requires a governmental entity to make reasonable and diligent efforts to acquire property by negotiation, that somehow Mr. Willis' contact with the SAIA tenant was justified. Such an assertion is nonsense. First, there is no plausible evidence in the record that Mr. Willis went to the subject property to negotiate the acquisition of property. Mr. Willis went there to obtain the telephone number of Mr. Pack so that he could present Mr. Pack with the survey papers and other documents associated with the City's intent to condemn a portion of SMP Properties' land. [see above, RB3, ¶¶ a-c] In doing so, he took it upon himself to show the tenant where the condemnation was to occur. Immediately, the tenant contemporaneously expressed a strong concern that the condemnation would go through the middle of the SAIA fuel tanks, and would impact the backing ability of its trucks to access four of the rented doors at the terminal, e.g. substantial interference. Second, there is no evidence that Mr. Willis was there to negotiate the acquisition of this portion of the property. Nevertheless, even if he was, he had no business undertaking negotiations with a tenant for the acquisition of the landlord's property. SAIA was not the owner of the property and would not have a role in the negotiation and acquisition of SMP Properties' land.

The City, at AB 11, also feebly argues that notwithstanding the visit by Mr. Willis and the negative impact of the visit, neither SMP Properties nor their tenant

suffered any use interference until eighteen (18) months later, at the time of the Preliminary Order of Entry. The problem with this assertion is the failure to recognize that SAIA and Mr. Pack were completing the renewal of a long-term lease, with renewals, to run not less than eight (8) more years. The fact that it took the City eighteen (18) months to file a condemnation proceeding does not lessen the economic impact of SAIA deciding not to renew a long-term lease after Mr. Willis' visit. Also, what the City continually attempts to gloss over is that it, in fact, did "take" the subject land where the fuel tanks were located, and thereby, also restricted access to four of the rental docks.

Other State Courts: The City, at AB12, cites to several out of state cases as establishing or supporting certain principles of condemnation law. In general terms, SMP Properties does not take issue with these general statements of law. However, most, if not all, are irrelevant or non-applicable to the facts and issues of this case. The City cites *Gardner v. The City of Cape Girardeau*, 880 S.W.2d 652 (Mo.App.1994) for the proposition that pre-condemnation survey work and the marking of property prior to condemnation was not a taking. Pre-condemnation survey work and the marking of the property is not the issue in this case. In fact, the City had surveyed the portion of the property it was taking prior to the time Mr. Willis visited the property. The City cites *City of Colorado Springs v. Andersen Mahon Enterprises, LLP,* 260 P.3d 29 (Colo. App. 2010) for the

proposition that pre-condemnation publicity does not necessarily constitute a taking. SMP Properties does not disagree with this statement and submits that *SFPT* establishes this point. However, pre-condemnation publicity is not at issue in this case.

Additionally, the City cites *Chicago Housing Authority v. Lamar,* 172 N.E.2d 790 (Ill.1961) for the point that negotiations and similar preliminary procedures, prior to the acquisition, are not, as a matter of law, a "damage" to property. Again, SMP Properties takes no issue with this statement of law. Mr. Willis, however, was not negotiating, rather, he was condemning by entering the property, contacting the tenant, and informing the tenant that the City was cutting a road through a portion of the property, through the fuel storage tanks of SAIA, and taking sufficient property to impact SAIA'S use of at least four doors at the terminal.

SMP Properties do take exception to how the City characterizes *City of Lewiston v. Lindsey*, 853 P.2d 596 (Idaho App. 1993). The City asserts the Idaho Court held that pre-condemnation notice and negotiations that resulted in the loss of a tenant prior to condemnation was not a taking. [AB12] The City's characterization of what the Idaho Court ruled is flawed. One of the pivotal questions of fact involved in the case was whether or not the condemning authorities had made representations to the property owner that caused the loss of

a tenant. The condemning authority denied that it had undertaken any steps or representations which would have interferred with the landowner's use of her property prior to the date of condemnation. The owner asserted numerous facts in contradiction, which the city denied. At trial, the (trial) court made a finding of fact that no such interference had occurred. The Idaho appellate Court stated that this determination was a factual one, of which the lower court had made a finding, which could only be reviewed on appeal for substantial evidence. The Idaho Court stated as follows: *[Id.,* 603]:

> "In this case, the trial court's determination that no taking occurred prior to August 31, 1988, is predicated on the court's factual finding that the City never interfered with Lindsey's use of her property prior to that date. That finding is supported by substantial, although conflicting evidence in the record, which we will not disturb on appeal."

This is quite different from the City's assertion that the Idaho appellate Court had made a determination, as a matter of law, that pre-condemnation interference with a landowner's tenancy "was not a taking".

II. Lease Renewal with Exchange of Promises:

The City, at AB13, argues that a "mere expectancy of a lease renewal" is not an interest in land that constitutes a legal right to compensation in a condemnation action. In support, the City cites to *State ex rel State Highway Division v. Gray*, 1970-NMSC-059, 81 N.M. 399, 467 P.2d 725. Nevertheless, Gray also stands

for the proposition that a tenant from year-to-year, with a covenant of renewal, may have his covenant damages accessed. The City also cites to the Arizona case, *State ex rel Miller v. Gannett Outdoor Co. of Arizona, Inc.,* 795 P.2d 221 (Ariz. 1990), in support of its "mere expectancy" proposition. The City fails to point out that the Arizona Court, at Page 223, recognized the exception that a "likelihood of renewal" under state land lease supported a condemnation award, citing to the New Mexico case of *State ex rel State Highway Comm'n v. Chavez*, 80 NM 394, 399, 456 P.2d 868 (1969). The Arizona Court also discussed the case of *Canterbury Realty Co. v. Ives*, 216 A.2d 426 (Conn.1966) which recognized that the "likelihood" that a lessee would exercise a right of renewal would support a condemnation award.

The City also cites to the case of *Environmental Control, Inc. v. City of Santa Fe,* 2002-NMCA-003, 131 N.M. 450, 38 P. 3d 891, as supportive. This Court, however, pointed out at Page 896, that a unilateral expectation of some benefit does not constitute a property interest. SMP Properties respectfully submits that more than a "unilateral expectation" occurred in this case. Promises were exchanged between the parties, $180,000 of fuel tanks were installed, and final written confirmation of renewal was being drawn for a lease period with renewals that would run for not less than eight (8) years.

III. Exclusion of Testimony of Appraiser and Owner:

The City asserts, at AB15, that the appraisal acts of SMP Properties' expert, Mr. Godfrey, are not supported by *City of Albuquerque v. Westland Development Co., Inc.,* 195 NMCA-136, 21 NM 144, 909 P.2d 25. SMP Properties respectfully submits that *Westland*, in fact, supports what Mr. Godfrey did, and that his appraisal representations which considered the income earning ability of the subject property prior to any condemnation activities, and comparing the income status of the property after the City's taking, was the proper approach to measure damages and loss of value. *Westland,* points out that the "before and after" formulation is deceptive. *Westland Id. 29* states that if one applies a purely temporal before and after calculation, the result would likely be an award of little or no compensation for diminition of value of the property. Mr. Godfrey recognized this fact, which is how he structured his appraisal.

The City also seeks to exclude the testimony of Mr. Pack, an owner, because the loss of SAIA lease revenues were, somehow, only "personal" to him, and have no bearing on the diminution in value caused to the property. To argue that lease revenues are irrelevant to the value of commercial property is simply incorrect. As commonly recognized, appraisals of properties usually involve three separate approaches to valuation. One by examining comparable sales, one by analyzing the costs of the acquisition of a subject land and construction of any improvements, and one by analyzing the income generating ability of a subject

property. Both appraisers in this case, the City's and SMP Properties', followed the income approach in valuing the subject property. Mr. Pack followed the same income approach in his determination of value. [2 RP 331, 334-336 and 348-349.] *See also*, Depo. Godfrey, 2 RP 448, pp. 27-28. *Id*, Pack Affidavit.

IV. The Stipulated Judgment Contained an Express Reservation of Rights, Recognized and Approved by the District Court:

The City at AB 23-29, attempts to distinguish the cited cases of SMP Properties and discounts the reservation of rights language contained in the subject Stipulated Judgment and accompanying Order entered with the District Court. [See, points & authorities, BIC 30-36, 2 SRP 598 & 594] Additionally, the City at AB 28 cites as supportive of its arguments the case of *Dorse v. Armstrong World Industries, Inc.,* 798 F.2d 1372 (11th Cir. 1986). SMP Properties submit that what the City is arguing in its citation to this case is vague. An examination of *Dorse* recognizes the points SMP Properties argues in their Brief in Chief. The 11th Circuit Court opined that when a stipulation for judgment, which is approved by the court, contains an express recognition of an intent to appeal, an appeal should be allowed. *[Dorse Id., 1376]*.

SMP Properties also points out the ruling in *Hense v. GD Searle & Co.,* 452 N.W.2d 440 (Iowa 1990), that when a party consents to a judgment, such consent judgment is never truly voluntary if a party is forced into consenting to judgment

as a result of prior rulings by the court which have precluded recovery. SMP Properties submit the rule of *Hense* applies here, because the district court granted partial summary judgment against them, precluding an inverse condemnation damage claim, coupled with two rulings which excluded its expert and "owner" from testifying as to consequential damages. These rulings forced a consent to judgment for purposes of putting the case into a posture so that it could be appealed under the requirement of a "final judgment" and to prevent a meaningless trial, hardly a voluntarily act by SMP Properties.

Based upon the facts and authorities set forth in SMP Properties' Brief-in-Chief and this Reply Brief, they respectfully request that this Court reverse the rulings of the district court.

Oral Argument. See BIC 35.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and served by email to opposing counsel of record on this 2nd day of December, 2016.