

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5633-07T1

STATE OF NEW JERSEY, BY THE
COMMISSIONER OF TRANSPORTATION,

Plaintiff-Appellant,

v.

MOHAMMED ARIFEE; JAWED ARIFEE
a/k/a AHMAD ARIFEE; BUBBLE BATH
CAR WASH, INC., n/k/a PALACE CAR
WASH, INC., a New Jersey
Corporation,

Defendants-Respondents,

and

ERAN MOYAL; CREDIGY SERVICES
CORP., a Nevada Corporation,
a successor to Credigy Receivables,
Inc., a New Jersey Corporation and
MONTCLAIR TOWNSHIP, in the
County of Essex, a Municipal
Corporation of New Jersey,

Defendants.

Argued March 30, 2009 – Decided August 27, 2009

Before Judges R. B. Coleman and Sabatino.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County,
L-782-08.

Wanda Y. Ortiz, Deputy Attorney General,
argued the cause for appellant (Anne
Milgram, Attorney General, attorney; Melissa

H. Raksa, Assistant Attorney General, of counsel; Ms. Ortiz, on the brief).

Edward D. McKirdy argued the cause for respondents (McKirdy and Riskin, P.A., attorneys; Anthony F. Della Pelle, of counsel and on the brief; Mr. McKirdy and Joseph W. Grather, on the brief).

PER CURIAM

Plaintiff, State of New Jersey, Commissioner of Transportation, appeals a final order entered by the Law Division on May 30, 2008, dismissing the State's complaint whereby it sought to use its power of eminent domain to temporarily acquire defendants' property. The issue before the Law Division was whether the State's failure to consider consequential business losses in its offer of compensation equated to a failure to conduct bona fide negotiations for the temporary taking. We affirm the Law Division's order.

We accept the following findings of fact from the Order to Show Cause proceedings conducted on May 1, 2008, before Judge Patricia K. Costello.

The State is planning a construction and repair project on the Bloomfield Avenue Bridge in Montclair Township. Defendants own and operate a nearby commercial business, the Palace Car Wash, located at 4-10 Bloomfield Avenue. The Commissioner of Transportation, on behalf of the State, seeks to acquire an easement consisting of the right to close defendants' driveway

to all commercial traffic for a period of nine months, plus any additional time the State may require for the completion of the construction project.

Defendants Mohammed and Jawed Arifee purchased the subject property and existing car wash business on March 7, 2007. According to the HUD-1 closing statement executed by the parties at closing, the amount due to seller was \$2,851,260.83. This price included a loan from the previous owner for \$1,600,000. The parties allocated the value to the buyer as follows: \$650,000 attributable to the contract sales price; \$650,000 attributable to land and buildings; \$650,000 to machinery; \$400,000 to goodwill; and \$500,000 to business. It is alleged that prior to the sale, the car wash serviced roughly 90,000 automobiles per year, generating between \$1,080,000 and \$1,260,000 of gross income annually. This income also included contracts with local police departments for auto detailing. Subsequent to purchasing the property, defendants made several physical improvements to the land and equipment.

On March 15, 2007, fifteen days after defendants closed on the property, the State's appraiser, Integrity Appraisal Group, met with defendants and inspected the car wash. The State appraised the market value of defendants fee simple, using a sales and comparison approach, at \$1,700,000. The State then

used that base number to calculate a Fair Market Rent and came up with a monthly rental value of \$18,974 a month, or, \$227,684 per year.¹ The State's appraisal purportedly included the rental value of onsite equipment, real estate taxes, insurance, and minimal utilities. On June 4, 2007, the State mailed defendants an "offer package" which included an offer letter, the State's appraisal for the property, and a parcel map. What the State's offer did not include was compensation for any of the lost business profit the car wash would normally generate. Nor did the State take into consideration the defendants' financing structure which would allegedly cause them to have a negative cash flow during the period the State occupied the property.

Defendants rejected the State's offer, claiming that they would incur debt and their expenses would accrue as a result of the closure. The State and counsel for defendants subsequently entered limited negotiations from June through October but could not agree on just compensation for the temporary taking of the business. On October 16, 2007, the State's negotiator submitted the case for condemnation.

On January 31, 2008, the State filed its Verified Complaint which sought temporary condemnation of defendants' property. On February 7, 2008, the court entered an Order to Show Cause.

¹ Approximately \$171,000 for the duration of the taking.

Oral argument was heard on May 1, 2008, and on May 30, 2008, judgment was entered dismissing the State's complaint. Judge Costello issued her written opinion on the same date. On appeal, the State argued: (1) the trial court erroneously held that just compensation can encompass consequential business losses, and (2) the trial court's ruling that the State did not engage in bona fide negotiations was erroneous and should be reversed. We address each in turn.

I.

The State first contends that lost business revenue is not to be a factor considered in determining just compensation for a taking. Rather, it urges, lost profit and good will are an incidental non-compensable item peculiar to the owner.

An owner of private property which is taken for public use is guaranteed just compensation by both the Federal and State Constitutions, and by New Jersey's Eminent Domain Act. U.S. Const. amend. V; N.J. Const. art. I, par. 20 (1947); N.J.S.A. 20:3-1 to 50. Ordinarily, however, in permanent takings, compensation is not considered for such incidental losses as "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 Comm'r v. Gallant, 42 N.J. 583, 587 (1964). Denial of incidental losses is ordinarily

judicially justified based upon the presumption that these losses "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. In permanent takings, compensation is, therefore, limited to fair market value of the property. State by Comm'r of Transp. v. Silver, 92 N.J. 507, 513 (1983).

Defendants concede that in a permanent taking of a fee simple estate, goodwill and business losses are generally not compensable. In temporary takings, however, defendants contend different factors must be considered when determining just compensation to the deprived property owner. To support this proposition, defendants rely predominately on Kimball Laundry Co. v. United States, 338 U.S. 1, 9-10, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949). Despite the straightforward principles established by the Supreme Court in Kimball, it is a case often selectively quoted. For this reason, we discuss the Court's holding in Kimball at length.

In Kimball, a privately owned and operated laundry plant was taken over by the government temporarily for the exclusive purpose of servicing the laundering needs of Army personnel during World War II. 338 U.S. at 3. The plant was commandeered by the military for a definite term to be extended from year to

year at the election of the government. Ibid. The plant facility was large and equipped with state-of-the-art equipment. Ibid. Throughout the duration of government occupation of the premises, the private business enterprise, having no other means to service its customers, was left wholly fallow. Ibid.

In that case, the trial court rejected the offers of the property owner to demonstrate the diminution in the value of his business through gross and net income for the eighteen years preceding the taking, and other evidence of the value of the business as a going concern. Id. at 8 (citing 166 F.2d 856 (8 Cir. Neb. 1948)). The trial court held that the diminution in the value of the business as a going concern was not a factor in determining fair market value for compensation purposes. Ibid. The Court of Appeals affirmed.

In reversing the lower court decisions, the Supreme Court rejected the finding under these particular circumstances, where the taking of private property is temporary in nature, that compensation for goodwill and business losses were not constitutionally required. Id. at 8. Specifically, the Court agreed with the defendant that he must be given

some allowance for diminution in the value of its business due to the destruction of its "trade routes." The term "trade routes" serves as a general designation both for the lists of customers built up by solicitation

over the years and for the continued hold of the [business] upon their patronage.

[Ibid.]

The Court recognized that the separate value added by the trade routes was directly related to the contributions of the business owner. Id. at 9. It noted that the "product of such contributions is an intangible which may be compendiously designated as 'going-concern value.'" Ibid. The Court then explained that although going concern value is intangible, it is transferable "to the extent that it has a momentum likely to be felt even after a new owner and new management have succeeded to the business property." Ibid. For illustrative purposes only, the Court noted that a taking in the context of condemnation of a business property, with governmental intent of continued operation of the owner's business, "the taker acquires going-concern value, [and] it must pay for it." Id. at 12 (emphasis added). That is, "[t]he owner retains nothing of the going-concern value that it formerly possessed; so far as control of that value is concerned, the taker fully occupies the owner's shoes." Id. at 13.

Notwithstanding this example, Kimball was not concerned with the government's intentional use, or ancillary benefit, of the owner's going-concern value. Rather, the core issue before the Court was the property owner's deprivation of that value,

irrespective of its usefulness to the governmental authority. The Court agreed with the appellate panel's finding that "[t]he Government did not take or intend to take, and obviously could not use, the [Kimball] Company's business, trade routes or customers." 338 U.S. at 8-9 (quoting Kimball, supra, 166 F.2d at 859). In Kimball, therefore, it was settled that the property owner's business was in no manner carried on by the government.

The explicit holding in Kimball was, thus, that a temporary taking through

an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable "taking" of property. If such a deprivation has occurred, the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it.

[338 U.S. 1, 13 (internal citations omitted).]

This holding comports with the well-established principle under the New Jersey Eminent Domain Act, N.J.S.A. 20:3-1 to 50, that "just compensation is paid for the property owner's loss, not what the condemning authority gains." Casino Reinvestment Development Authority v. Katz, 334 N.J. Super. 473, 484 (Law Div. 2000) (citing State v. William G. Rohrer, Inc., 80 N.J.

462, 467 (1979)); see also 4 Nichols on Eminent Domain § 12.21 at 12-86.1 (3rd ed. 1978).

The Supreme Court distinguished the nature of the taking in Kimball, and similarly situated property owners, from permanent condemnation cases as follows:

The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemner's obligation to him. It is a difference in degree wide enough to require a difference in result.

[Kimball, supra, 338 U.S. at 15 (emphasis added).]

The Court explained that in a permanent taking, lost profit and good will are generally not compensable because the owner can relocate his business elsewhere and presumably preserve or recover his trade routes and going concern; in that regard, nothing has been taken from him. Id. at 11; see also City of Trenton v. Lenzner, 16 N.J. 465, 476 (1954). Conversely, the government's temporary taking of a business property completely deprives the owner of conducting any business at all; since the taking is for a definite amount of time, the owner realistically cannot relocate as his "investment remain[s] bound up in the reversion of the property." Kimball, supra, 338 U.S. at 14. Thus, while the business operations are suspended, all the owner can likely do is wait and hope to rebuild any going-concern

value that is lost in his trade routes as a result of the taking. Ibid. Under these circumstances, the owner suffers an unavoidable diminished value in his going concern for which the government must provide compensation. Ibid.

In accord with the holding in Kimball, it has long been the rule in our courts that government must place the owner in "as good a position monetarily as the owner would have occupied had the property not been taken, since what is to be valued for taking purposes is what the involuntary sellers have to sell, rather than what the public buyer seeks to acquire." Casino Reinvestment, supra, 334 N.J. Super. at 485 (citing People v. Lynbar, Inc., 253 Cal. App. 2d 870, 880, 62 Cal. Rptr. 320 (Cal. Ct. App. 1967); Rohrer, supra, 80 N.J. at 467).

Here, the State's argument fails to acknowledge the fundamental difference in principles between permanent and temporary takings. It is a distinction with a difference, however, and one that cannot be disregarded in our analysis.

In her letter opinion dated May 30, 2008, Judge Costello found:

Here, plaintiff seeks an easement which will temporarily close the driveway on the subject property to commercial traffic. To the extent the Arifee defendants can demonstrate consequential business losses, such as loss of income, plaintiff erred in excluding that information as an element for purposes of valuation. This is not the

ordinary case in which a condemnee may relocate its business to another venue or where loss of income would be too speculative to warrant compensation. Rather, this case involves a temporary taking, denying the Arifee defendants use of their commercial property while also eliminating the possibility of relocating since plaintiff will eventually return the property to them. As a result, it is necessary to consider the consequential loss of business in a finite period as an element of the compensation offer in this case. Failure to do so equates to a failure to offer the Arifee defendants full value before suit is instituted, which is fatal to plaintiff's offer to purchase.

Consideration must be given to "the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put." Lenzner, supra, 16 N.J. at 478 (quoting Housing Auth. of Bridgeport v. Lustig, 139 Conn. 73, 90 A.2d 169 (Sup. Ct. Err. 1952)). "[T]he income generated by a property has been held to be generally the surest indicator of its value for purposes of eminent domain." Casino Reinvestment, supra, 334 N.J. Super. at 485 (holding the appraiser's value did not reflect the true loss to the property owner because it failed to consider the actual rental history of the property) (citing 7A Nichols on Eminent Domain, § 9A.04(1)(c)(iii)). "In assessing the earning power of a property, income is estimated using the income and expense

history of the subject property." Id. at 486 (citing The Appraisal of Real Estate, (Appraisal Institute 11th ed.)).

A careful review of the record shows that the cases on which the State relies do not involve a temporary taking. The federal and out-of-state cases the State relies upon are also quite distinguishable from the case under review for that reason. We find Kimball to be controlling and, therefore, determine that the trial court properly determined that defendants are constitutionally entitled to just compensation for consequential business losses that would result from this particular temporary taking.

II.

The State contends that the trial court erred in dismissing its complaint for failure to comply with the statutory requirement of bona fide negotiations, pursuant to N.J.S.A. 20:3-6. More specifically, the State claims:

By equating inclusion of non-compensable matters as being compensable in an appraisal to lack of bona fide negotiations, the trial court is penalizing the State for abiding by settled law that just compensation does not include consequential business losses. If the Court disagreed with the measure of damages that the State offered [defendants], it is an issue that should have been reserved for the award of just compensation, not an issue warranting dismissal of the condemnation complaint.

In Casino Reinvestment, the condemning authority made a contention similar to that which the State now makes. 334 N.J. Super. 473, 487. There, the authority argued that the failure of the appraiser to use the property's actual income, i.e., rents, in arriving at fair market value should not have been dispositive. Instead, it asserted the property owner would have an opportunity to submit its own appraisal using the actual rents, "and the condemnation commissioners, or a jury, would decide which value to accept." Ibid. Following precedent, the trial court rejected that argument and held that "the failure to consider the actual rents as an element for purposes of valuation does not fully compensate the property owner for the loss of the property; rather, it represents a failure to offer the property owner full value before suit is instituted, which is fatal to the condemning authority's offer to purchase." Ibid. Therefore, the authority's complaint was dismissed as it had failed to comply with its statutory obligation to engage in bona fide negotiations with the property owner, and "the failure could not be cured at a subsequent time." Ibid.

It is well settled that a condemning authority is required to engage in the process of pre-litigation bona fide negotiations. City of Passaic v. Shennett, 390 N.J. Super. 475, 483 (App. Div. 2007) (citing Casino Reinvestment, supra, 334

N.J. Super. at 480-81); State by Comm'r of Transp. v. D'Onofrio, 235 N.J. Super. 348 (Law Div. 1989); State v. Hancock, 208 N.J. Super. 737 (Law Div. 1985), aff'd 210 N.J. Super. 568 (App. Div. 1985). N.J.S.A. 20:3-6 requires the municipality to engage in

bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee . . . setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules.

The statute further mandates "no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee" N.J.S.A. 20:3-6.

The object of N.J.S.A. 20:3-6 is to "encourage acquisitions without litigation, thus saving both the acquiring entity and the condemnee the expense and delay of litigation." Casino Reinvestment, supra, 334 N.J. Super. at 481. "Compliance with the pre-litigation requirements of the statute is jurisdictional, and failure of the condemnor to comply with the pre-litigation requirements will result in dismissal of the complaint." Shennett, supra, 390 N.J. Super. at 483; D'Onofrio, supra, 235 N.J. Super. at 348.

Our Supreme Court interpreted the Act as mandating strict compliance with the requirements of a fair offer, reasonable disclosure, and bona-fide negotiations and to be "construed and applied in a manner protective of property owners." State by Comm'r of Transp. v. Carroll, 123 N.J. 308, 316 (1991) (quoting F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985) ("in the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners."). Furthermore, minimal compliance with the Act will not escape judicial scrutiny where the condemning authority meets merely "the minimum threshold to good faith negotiations" County of Morris v. Weiner, 222 N.J. Super. 560, 564 (App. Div. 1988).

In Weiner, we affirmed the trial court's decision in a condemnation action for defendant property owners because plaintiff county did not attempt to acquire the property through bona fide negotiations. The reviewing panel found that the defendant's rejection of the County's offer was justified by "concrete and highly credible evidence that the property was worth substantially more than the amount offered." Id. at 565. Their determination was based in part upon the county's much lower appraisal than the owner's recent mortgage loan taken on

the property, the accompanying bank appraisal, and a third-party offer to purchase. Ibid.

Similarly, the defendants in the case now under review purchased and physically improved the property at issue just weeks prior to the State's appraisal and offer. Also, the property is alleged to have a substantial history of annual income. At the very least, the State was obligated, pursuant to N.J.S.A. 20:3-6, to consider defendant's full mortgage amount and lost revenue in its negotiations with defendant on compensation. The State improperly calculated the value of the temporary taking based on a fair market rent formula. The State's offer, calculated without consideration of defendants' actual lost profits, does not suffice as "just compensation." The imputed rent that a hypothetical commercial tenant might have paid defendants to lease the premises for a short period of time -- even assuming such a tenant would have existed -- is entirely different from the profits that the premises would have been likely to generate during that same period if defendants' car wash business had not been interrupted.

In Rockaway v. Donofrio, 186 N.J. Super. 344 (App. Div. 1982), plaintiff municipality filed a complaint to condemn defendants' property for street improvements. Id. at 354. Defendants contended that the municipality had not complied with

N.J.S.A. 20:3-6 because defendants were not provided the opportunity to physically accompany the appraiser to the property. Id. at 347-48. The trial judge agreed, however, he allowed the municipality to attempt to cure the defect without dismissing the action and stayed the case pending appointment by plaintiff of a new appraiser.

On appeal, we reversed, ruling that the plaintiff's action should have been dismissed upon a finding of non-compliance with N.J.S.A. 20:3-6. The panel held that the Eminent Domain Act of 1971 should be strictly construed:

If a condemnor may ignore the statute and later cure the proceedings, the purpose of N.J.S.A. 20:3-6 will be completely frustrated. Indeed, an order for a stay so that a condemnor may then do what it should have done earlier will encourage noncompliance with N.J.S.A. 20:3-6. A condemnor will know that if it does not comply, it may nevertheless proceed.

[Donofrio, supra, 186 N.J. Super. at 354. See also Monmouth County v. Whispering Woods, 222 N.J. Super. 1, 10 (App. Div. 1987), cert. denied, 110 N.J. 175 (1988) (noting that dismissal of the complaint will have a "prophylactic effect" and promote compliance with the statute).]

The panel in Donofrio looked to the legislative history and the stated object of the Act:

To foster amicable adjustment and thereby reduce litigation, the statute shall require that before proceedings are instituted, the condemning body shall conduct bona fide

negotiations with the owners, through fair offers of compensation, including a reasonable disclosure of the manner of arriving at the offer.

[Id. at 350 (quoting from the conclusions and recommendations of the Eminent Domain Revision Commission Report submitted April 15, 1965).]

In Donofrio, the reviewing panel recognized that the trial judge's decision to stay the action and permit the State to comply with N.J.S.A. 20:3-6 "seems to comply with the general approach our courts take with respect to defects in proceedings." Donofrio, supra, 186 N.J. Super. at 352. In this regard, "the rules of court are liberal with respect to amendments to pleadings." Ibid. (citing R. 4:9-1). Hence, it is ordinarily preferable to "dispose of matters on their merits rather than [sic] on technical bases." Ibid. (citing Grubb v. J.C. Penney Co., Inc., 155 N.J. Super. 103 (App. Div. 1978)). Nonetheless, the Donofrio panel found special circumstances to exist in condemnation cases which warrant departure from our general practices. Ibid.

The departure is justified, in part, because condemnation cases inherently involve a condemnee's constitutional rights. Washington Market Enterprises, Inc. v. Trenton, 68 N.J. 107, 116 (1975). The Donofrio panel explained:

If a condemnee must engage an attorney to represent him, then the fees of the attorney

will necessarily reduce the award of just compensation kept by the condemnee. The Eminent Domain Act does not require that upon completion of a proceeding the condemnor must pay the condemnee's legal fees and other expenses in the proceeding as an additional element of damage. Nor is there any provision in our court rules providing for allowance of attorney's fees to the condemnee. Therefore, the requirements of N.J.S.A. 20:3-6 are important in giving a condemnee an opportunity to receive and keep his full award.

[186 N.J. Super. at 352-53.]

Compliance with the pre-litigation requirements of the Act is jurisdictional, and failure of the condemning authority to comply with them "will result in dismissal of the complaint." Shennett, supra, 390 N.J. Super. at 482-83 (citing Casino Reinvestment, supra, 334 N.J. Super. at 481). In Shennett, the panel found that "[s]ince the prerequisites are jurisdictional, the trial court lacked authority to act on the condemnation complaint." Id. at 83. For this reason, "[a] condemnation complaint must be dismissed when the government entity fails to comply with the pre-condemnation requirements." Id. (citing City of Atl. City v. Cynwyd Invs., 148 N.J. 55, 69 (1997)).

In her letter opinion, Judge Costello determined: "[I]t is necessary to consider the consequential loss of business in a finite period as an element of the compensation offer in this case." Since business losses are a factor in calculating just

compensation in temporary takings, the judge found that the State was obligated to negotiate with defendants in good faith concerning their actual losses. In failing to include the lost profit which defendants would incur as a result of the temporary taking, the State failed to comply with the requisites of N.J.S.A. 20:3-6. Judge Costello explained:

Here, the appraiser did not consider the consequential business losses that would result from a temporary taking of the Arifee defendants' property when he arrived at the offer for compensation. Although plaintiff's appraiser acknowledged that the highest and best use of the subject property was as a car wash, plaintiff did not consider evidence of the subject property's value such as its historical income.

The State's noncompliance in this respect could not be overlooked. Therefore, Judge Costello correctly dismissed the State's complaint.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION