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Superior Court 2
Howard County, Indiana

STATE OF INDIANA
SS:
COUNTY OF HOWARD

IN THE HOWARD SUPERIOR COURT

CAUSE NO: 34D02-1612-PL-00937

CITY OF KOKOMO, INDIANA

VS

ESTATE OF AUDRA R. NEWTON

DEFENDANT'S RESPONSE TO CITY OF KOKOMO'S MOTION TO CORRECT ERROR

Comes now the Defendant, the Estate of Audra R. Newton ("Estate"), by and through counsel, and for it's response to City of Kokomo's ("City"), Motion to Correct Error, respectfully state as follows:

I.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises out of the City's Action for Condemnation of Real Property located at 226 S. Main St., filed on December 22, 2016. The Estate filed its Answers and Affirmative Defenses on February 9, 2017. The City filed its Motion for Appointment of Court Appraisers on February 16, 2017, which was granted on March 2, 2017. On July 27, 2017, the court appointed appraisers to file their Report of Appraisers. The City filed its Motion to Deposit Funds pursuant to Appraisers Report on August 4, 2017, which was granted on August 7, 2017. On August 7, 2017, the City filed its Motion for Possession of Real Estate together with Clerk's Receipt for payment of $143,000.00, and the same was granted on August 8, 2017. On December 14, 2017, the City, by City Attorney Garrison, demanded the Estate (the Newtons) vacate the premises within 48 hours. On August 16, 2017, the City conceded to allow the Estate until August 31, 2017, to vacate. This matter proceeded to Jury Trial on March 12, 2019, and proceeded to Jury Verdict on March 15, 2019. The Jury returned a verdict awarding damages in the sum of $305,600.00.

II.

ARGUMENT

A.

The jury verdict was not excessive because just compensation in cases involving a partial taking is generally the fair market value of the property taken plus all the damages which the residue suffers, including the diminution of the fair market value of the remainder.

The City first began discussions with Brad and Wesley Newton regarding requiring the 226 S. Main St. property in 2013. These discussions, at some point in time thereafter, were solely between Wesley Newton and City Engineer Cary Stranahan. Never did the City inquire as to who the executor of the Estate of Audra Newton was, or attempt to limit negotiations to the executor. In fact, the City had no clue who the executor was until the trial had commenced. The City proceeded from 2013, continuously until mid-way through the jury trial in March 2019, to treat the Estate, Bradley Newton, and Kokomo Glass Shop as one singular unit. Not until mid-way through the jury trial did the City decide, assumedly for strategic reasons, they no longer wished to consider the Estate, the Newtons, and Kokomo Glass Shop as one unit or party to the lawsuit.

The City now argues that the jury verdict was excessive as Kokomo Glass Shop cannot be awarded damages. This argument, if there is viability to the same, was waived. Failure to name the proper party in the caption of a complaint concerns the trial court's jurisdiction over the particular case. *Harp v. Indiana Dept. of Highways,* 585 N.E.2d 652, 659 (Ind. Ct. App. 1992). But jurisdiction over the case may be established, despite the plaintiff's failure to name the proper party, if the opposing party neglects to raise the issue at the earliest opportunity. Id. The City cannot have it both ways. The City cannot proceed treating the Estate, the Newtons, and Kokomo Glass Shop as one singular unit, then mid-way through trial change course. Here, the City waived any argument by proceeding in the litigation, treating the Estate, the Newtons, and Kokomo Glass Shop as one unit. The City made no objection to Brad Newton, Cathy Newton, and Wesley Newton sitting at counsel table during voir dire.

The City next argues that the damages sought were not in the nature of damages to the residue. This argument, too, fails. When only part of an owner's property is taken, the damages must include the fair market value of the land that was taken, and any damage to the rest, or "residue," of the property.

Just compensation in cases involving a partial taking is generally the fair market value of the property taken plus *all the damages which the residue suffers, including the diminution of the fair market value of the remainder.* Severance damages may be awarded only if three conditions are met: (1) simultaneous unity of title, (2) unity of use, and (3) contiguity. *Unger v. Indiana & Michigan Electric Co.,* 420 N.E.2d 1250 (Ind. Ct. App. 1981). *Emphasis added.*

Here, Mr. Dale Webster, who testified he was an expert in the area of condemnation appraisals testified to these three elements. He specifically testified that 226 S. Main St. and 226 S. Union St. had unity of title/ownership, they were contiguous, and they were used in the same way. Thus, all three elements were met in order to consider the damages to the residue. The City presented no evidence whatsoever contrary to Mr. Webster's testimony. Therefore, it is absolutely reasonable and appropriate for the jury to consider and award residual damages.

The City then argues that none of the residual damages the Estate asked the jury to award were recoverable in this action. This is true, when there is a taking of an entire parcel. However, this is not the case when dealing with a partial taking where the residual has suffered damages. That is the case at hand. The City however fails to recognize *all the damages, which the residue suffers, including the diminution of the fair market value of the remainder. Id.*

The City continues to fail to recognize that the taking of 226 S. Main St. was a partial taking. The City, in its motion, argues that Kokomo Glass Shop's residual damages were incurred because "Kokomo Glass could not conveniently carry on its business after the taking…". This is contrary to the testimony at trial. The testimony, which was not rebutted in any way, was that it became *impossible* for Kokomo Glass Shop to operate at its previous location after the City took apart its manufacturing building. *Emphasis added.* "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the *Fifth Amendment* contemplates. *United States v. General Motors Corp.,* 323 U.S. 373. This is the precise scenario that was left in the wake of the City's taking in this case. The Estate admitted into evidence the damages to the residue for the jury's consideration. The City failed to present any evidence whatsoever. Therefore, the jury verdict was neither excessive, nor did it include damages not covered.

B.

The jury verdict was supported by the evidence.

The jury verdict was supported by the evidence. The jury was to consider the residual damages. Final instruction #14, instructed the jury as follows:

> When only part of an owner's property is taken, the damages must include the fair market value of the land that was taken, and any damage to the rest, or "residue," of the property, including the diminution of the fair market value of the remainder. An owner may be compensated for every element of damage that will naturally and ordinarily result from the taking.

It was stipulated that the award for 226 S. Main St., alone, was $100,000.00. Which give the jury its starting point. Thereafter, the Estate offered several exhibits regarding damages. Specifically, exhibits K, L, M, N, U, V, W, X and Y were offered and admitted into evidence by the Estate. These exhibits outlined specific damages as follows:

K - Schreiner invoice	$1,800.00
L - Huston Electric	$12,085.00
M - Monroe Constr.	$37,900.00
N - Guyer the Mover	$35,910.35
U - Scrap lost	$9,339.99
V - Union St. Est.	$20,800.00

W - Advertising	$28,240.00
X - Work orders	$1,881.48
Y - Appraisal	$3,250.00

These costs alone add up to an additional $151,206.00. Further, Mr. Dale Webster testified that there was a residual damage in the sum of $43,000.00 in addition to the $100,000.00 for the taking of the 226 S. Main St. property. (Tr. Vol. I at 101). The City argues the evidence did not support these figures. The Estate would argue this was the *only* evidence! The City failed to put on any evidence, but now wants to argue that the *only* evidence presented is somehow "not supported by the evidence." This is nonsensical. The City cites counsel's closing arguments, not the actual exhibits before the jury. The City fails to understand those statements are closing arguments, not evidence, as the jury was instructed. The jury had exhibit and testimony before them. The City failed to present any evidence to contradict the Estate's exhibits, but now wants to argue the only evidence before the jury was somehow unsupported.

A verdict awarding damages will only be reversed when it is apparent from a review of the evidence concerning the injuries that the amount of damages assessed by the jury is so great as to indicate that the jury was motivated by prejudice, passion, partiality, or corruption, or considered some improper element. *Tipmont Rural Elec. Mbrshp. Corp. v. Fischer*, 697 N.E.2d 83 (Ind. Ct. App. 1998), citing, *Lutheran Hospital of Ind., Inc. v. Blaser,* 634 N.E.2d 864, 873 (Ind. Ct. App. 1994). We will not deem a verdict to be the result of improper considerations unless it cannot be explained on any other reasonable ground. *Prange v. Martin*, 629 N.E.2d 915, 922 (Ind. Ct. App. 1994). If there is any evidence in the record which supports the amount of the award, even if it is variable or conflicting, the award will not be disturbed. *Id.* The Court went on to say, "our inability to actually look into the minds of jurors and determine how they computed an award is, to a large extent, the reason behind the rule that a verdict will be upheld if the award falls within the bounds of the evidence. *Tipmont Rural Elec. Mbrshp. Corp. v. Fischer*, 697 N.E.2d 83 (Ind. Ct. App. 1998), citing, *Symon v. Burger*, 528 N.E.2d 850, 853 (Ind. Ct. App. 1988).

Here, the City is asking the Court to overturn a reasonable verdict that is clearly within the bounds of the evidence. The verdict was not excessive. The verdict was supported by the evidence. The verdict should be upheld.

C.

The trial court erred in failing to award judgment interest dating back to the date of the taking.

The trial court erred in failing to award judgment interest dating back to the date of the taking. This Court entered Judgment on the jury verdict on March 15, 2019. Said judgment awarded interest accruing at the rate of 8% per annum from the date the City of Kokomo, Indiana took possession of the property on August 8, 2017. This is contrary to statute. Ind. Code §32-24-1-11(6) provides:

> In any trial of exceptions, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant's damages from the date plaintiff takes possession of the property.

The court determined the date the City took the property of the Estate was December 22, 2016 (Jury Instruction #5). Thus, any interest award shall relate back to the date of the taking – December 22, 2016.

CONCLUSION

The jury verdict was not excessive in this matter. The Court should deny the Plaintiff's Motion to Correct Errors for the reasons set forth above. Further, the Court should modify its judgment and order judgment interest to date back to the date of the taking, December 22, 2016, and any other relief just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading upon the following parties by depositing the same in the United States mail, postage prepaid, this 17th day of May, 2019:

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