SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5248-15T4

TOWNSHIP OF BLOOMFIELD, a public body corporate and politic of the Township of New Jersey,

Plaintiff-Appellant,

v.

BLOOMFIELD DAVAL CORP.,

Defendant-Respondent,

and

STATE OF NEW JERSEY,

Defendant.

Argued February 13, 2018 – Decided April 10, 2018

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4758-12.

Kevin P. McManimon argued the cause for appellant (McManimon Scotland & Baumann, LLC, attorneys; Kevin P. McManimon, of counsel and on the briefs; Frances E. Barto, on the briefs).

Anthony F. Della Pelle argued the cause for respondent (McKirdy, Riskin, Olson and Della Pelle, PC, attorneys; Anthony F. Della Pelle, of counsel; Richard P. De Angelis, on the brief).

PER CURIAM

Following a jury trial in this condemnation action, plaintiff Bloomfield Township (Township) appeals from a June 22, 2016 final judgment awarding defendant Bloomfield Daval Corporation (defendant)[1] $2,900,000 as just compensation for defendant's property located in the Township, at 14 Lackawanna Place. On appeal, the Township argues the trial judge erred by denying its motion to preclude defendant's experts from testifying as to a proposed mixed-use project, asserting it was neither legally permissible nor financially feasible. Additionally, the Township argues the judge erred by granting defendant's motion to preclude plaintiff's expert from testifying as a rebuttal witness. We reject plaintiff's first argument, but conclude the second argument has merit. We therefore reverse and remand for a new trial.

[1] Plaintiff's complaint also named the State of New Jersey as a defendant "by reason of corporation franchise taxes that may be due and unpaid by Bloomfield Daval Corp." The State did not file an answer or otherwise enter an appearance.

I

We discern the following facts from the trial record. Defendant's property consisted of a historic two-story train station, 3617 square feet in size, and situated on .62 acres. Although listed in National and State Historic Registers, the building remained unused for twenty years, and fell into disrepair. Additionally, New Jersey Transit holds a permanent easement, allowing access from Lackawanna Place through the train station to the eastbound train platform, as well as the tunnel underneath the tracks to the westbound platform. Thus, any development of the property would require the approval of the Township, the New Jersey Federal Historic Society, and New Jersey Transit. Located within the Township's designated redevelopment area, the property met all of the requirements for that area.

In 2008, the Township adopted a redevelopment plan and parking study to revitalize the Township's downtown area. In accordance with that plan, the Township and Haberman Building Corporation (HBC), an affiliate of defendant, entered into a Memorandum of Understanding (MOU) in September 2009, concerning the redevelopment of the property. In October 2009, the Township adopted a resolution, designating HBC as the conditional redeveloper for the property. The record does not indicate what transpired after the adoption of the resolution in 2009; however,

in September 2011, the Township passed an ordinance terminating HBC's conditional redeveloper designation and the MOU.

In February 2012, the Township authorized the acquisition of defendant's property through eminent domain. The Township commissioned Robert McNerney, an appraisal expert, to prepare a report on the highest and best use for the property. According to McNerney's May 2, 2012 report (McNerney Report), renovation of the existing train station on the property constituted the highest and best use of the property. McNerney valued the market value of the fee simple estate at $440,000.

In June 2012, the Township filed an eminent domain action against defendant. The trial court entered an order granting the Township's request for the taking and appointed commissioners to determine just compensation, which they fixed at $506,433. Defendant appealed the commissioners' award and the matter proceeded to trial.

Both parties retained expert witnesses to assist at trial. Defendant hired appraiser Jon Brody, who authored a report (Brody Report) that concluded the highest and best use of the property

was a mixed-use project consisting of thirty-four residential dwelling units and 12,876 square feet of commercial space.[2]

Along with other experts, the Township hired Andrew Janiw of Beacon Planning and Consulting, LLC to provide expert testimony regarding the likelihood a developer could secure funding for a mixed-use project. In his report (Janiw Report), Janiw concluded a mixed-use project for "the subject property is incapable of receiving financing for development."

Prior to trial, defendant moved in limine to bar Janiw's testimony and consideration of his report, along with other Township expert reports and witnesses. Judge Dennis Carey denied defendant's motion, ruling that "the finder of fact is entitled to hear [the] information in whatever context the trial judge allows it."

At trial, the Township moved in limine to preclude defendant's expert testimony regarding the mixed-use project. The Township argued the mixed-use project did not satisfy the highest and best use test as the project was neither legally permissible nor financially feasible. The trial judge rejected the Township's argument and denied its motion, finding "there is a sufficient

[2] Brody later issued an amended report, reducing the potential square footage of commercial space to 12,536.

basis to let that issue go to the jury." Additionally, defendant renewed its motion to preclude the Township from presenting Janiw's testimony regarding the lack of financial feasibility for the mixed-use project; however, the trial judge stated he would not consider the renewed motion as Judge Carey already denied it.

Just before trial testimony began, the Township requested the trial judge reconsider his denial of its in limine motion to preclude Brody's expert testimony regarding the mixed-use project; in the alternative, the Township requested the judge to conduct an N.J.R.E. 104 hearing, as recommended in Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 143 (2013). The judge granted the alternative request and held an N.J.R.E. 104 hearing, where defendant presented testimony from Brody and Marc Parette, a licensed architect and planner. At the end of the hearing, the judge ruled in favor of defendant, concluding Brody's proffered testimony was not "overly speculative."

The trial was largely a contest of experts focusing on the fair market value (FMV) of the property as of the taking. The experts provided their opinions on the highest and best use of the property, guided by the parameters that the use was (1) legal and permissible; (2) physically possible; (3) financially feasible; and (4) maximally productive. Cty. of Monmouth v. Hilton, 334 N.J. Super. 582, 588 (App. Div. 2000).

The Township presented expert testimony from McNerney, who offered his opinion that the property had a FMV of $450,000. He testified that "the highest and best use" for the subject property would be a complete renovation of the first floor of the existing building for retail use. McNerney further stated that "the dollars that would have to be expended [for] any other use wouldn't make any economic sense."

Defendant presented Brody's testimony that the highest and best use of the property was a mixed-use project consisting of thirty-four residential dwelling units and 12,536 square feet of commercial space. Brody considered a development plan prepared by Parette, whose plan called for renovating the existing train station and developing a mixed-use project on either side and above the train station. That plan took advantage of the shared parking facilities across the street to accommodate any parking generated by the redevelopment. Brody also relied on the expert testimony of Mark Gordon, a "transit-oriented development" consultant, who testified regarding the desirability of a mixed-use development in close proximity to a train station. Brody estimated the FMV of the taking at $3,207,000.

Before the Township called Janiw to provide rebuttal testimony regarding financial feasibility of the mixed-use

project, defendant renewed its motion to bar him from testifying.[3] Defendant argued Janiw was not a licensed appraiser and therefore was not qualified "to offer a value conclusion about a piece of real estate." Counsel for the Township requested the opportunity to demonstrate that Janiw possesses the credentials to offer an opinion on the crucial issue of the financial feasibility of defendant's proposed mixed-use project. Without explanation, the judge did not afford the Township the opportunity to present Janiw's credentials[4] and testimony in an N.J.R.E. 104 hearing.

The trial judge acknowledged he was not in possession of the briefs the Township submitted to Judge Carey, when he previously denied the same motion; nevertheless, the judge granted defendant's motion barring Janiw's testimony, concluding his proffered testimony was "too speculative."

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[3] The Janiw Report included a five-year income and value analysis and a projected pro forma cost analysis for the mixed-use project proposed by defendant's architect. Based upon this analysis, Janiw opined "the cost to construct the collateral" would far exceed its value; as a result, he concluded the project was "incapable of receiving financing for development."

[4] According to Janiw's curriculum vitae, he holds undergraduate and graduate degrees in civil engineering and construction management. He has more than thirty years' experience "in the negotiation and finance of real estate transactions and the development of commercial and residential properties." He was also the "Vice President of the Real Estate Lending Group at National Westminster Bank and Director of Acquisitions for a regional real estate development firm."

The Township then offered Maurice Stack as a rebuttal real estate appraiser. Stack criticized the Brody Report for lacking any real analysis as to how the property — if developed pursuant to the Parette development plan — would proceed; for lacking information on the train station's "deteriorated condition"; for lacking information on how much the whole development plan would cost; and other important details. Notably, Stack testified all of the comparable sites used by Brody had on-site parking and he disputed the modest adjustment utilized by Brody regarding the absence of on-site parking. According to Stack, the adjustment needs to reflect the cost of purchasing the parking spaces from the shared parking garage.

After hearing the testimony from the various experts, the jury found that $2,900,000 constituted just compensation for defendant's property. On June 22, 2016, the trial judge entered an order for final judgment and fixed the just compensation at the amount awarded by the jury. This appeal followed.

II

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)). The abuse of discretion standard applies to a trial court's decision to bar an undisclosed witness or a rebuttal

witness. Wymbs v. Twp. of Wayne, 163 N.J. 523, 543-44 (2000); Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 497 (App. Div. 2000). Trial courts generally have discretion to limit or exclude witnesses. State v. Hill, 121 N.J. 150, 169 (1990).

N.J.R.E. 702 and 703 frame the analysis for determining the admissibility of expert testimony. N.J.R.E. 702 allows opinion testimony from experts qualified in their fields. N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must "be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Townsend, 221 N.J. at 53 (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (alteration in original) (quoting Polzo, 196 N.J. at 583). Therefore, courts require an expert to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting 66 E. Allendale, 216 N.J. at 144). The net opinion rule requires experts to "identify the

factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule prohibits "speculative testimony." Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

However, simply because the opinion may be subject to attack on cross-examination for not including other meaningful considerations, does not make it a net opinion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990)); see also Glowacki v. Underwood Mem'l Hosp., 270 N.J. Super. 1, 16-17 (App. Div. 1994) (declining to strike an expert's testimony as a net opinion as "[a]ny shortcoming in his method of analysis was explored and it was for the jury to determine the weight his opinion should receive.").

N.J.R.E. 104(a) provides a "judge may hear and determine" matters relating to "the qualification of a person to be a witness, or the admissibility of evidence" outside the presence of the jury. The decision to conduct an N.J.R.E. 104 hearing rests within the sound discretion of the trial court. Kemp ex rel. Wright v. State, 174 N.J. 412, 432 (2002). However, when the trial court's

ruling on admissibility may prove "dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a [N.J.R.E.] 104 hearing." Id. at 432-33.

A. Defendant's Mixed-Use Project Testimony

The record reflects no real dispute that the applicable zoning for the subject property would permit a mixed-use project consisting of residential and commercial uses. Instead, the Township's argument regarding legal permissibility of the proposed mixed-use project concerns the issue of parking. Defendant's position was that the project would use parking off site. The Township argued that there was no on-site parking in the proposed project and, therefore, it was not legally permissible; however, the applicable zoning did not require on-site parking. We view this issue as a jury question, which goes to the weight and credibility of the opinions of the various experts. We discern no abuse of discretion in the trial court's decision to allow defendant's experts to testify regarding a mixed-use project.

Regarding the financial feasibility of the proposed mixed-use project, Brody testified that he completed his own analysis and also relied on a study performed by Gordon.[5] As noted, experts

[5] The record before us does not include the Gordon study.

are permitted to rely on other experts so long as that is a consistent practice in the testifying expert's area of expertise. Townsend, 221 N.J. at 53. In fact, the Township does not argue that Brody could not rely on Gordon's report; instead, the Township argues that there simply was no reasonable basis for opining that the proposed mixed-use project was financially feasible. The trial court fully explored that issue in an N.J.R.E. 104 hearing and found sufficient evidence to allow the jury to evaluate the argument. We discern no abuse of discretion in that decision.

B. Janiw's Rebuttal Testimony

Judge Carey originally denied defendant's motion to preclude Janiw's testimony and report prior to trial. However, the trial judge overturned Judge Carey's order and granted defendant's renewed motion to preclude Janiw's rebuttal testimony that defendant's specific mixed-use project was not financially feasible.

The Township first argues the trial judge erred in disturbing Judge Carey's pre-trial ruling. Traditionally, judges "sitting in the same court and in the same case should not overrule the decisions of each other." Clarkson v. Kelly, 49 N.J. Super. 10, 16 (App. Div. 1958) (citing TCF Film Corp. v. Gourley, 240 F.2d 711, 714 (3d Cir. 1957)). However, "there may be exceptional circumstances under which the rule is not to be applied." Ibid.

Regarding motions in limine, "[o]ur courts generally disfavor in limine rulings on evidence questions . . . ." Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 470 (App. Div. 2015) (quoting State v. Cordero, 438 N.J. Super. 472, 484-85 (App. Div. 2014)), certif. denied, 224 N.J. 529 (2016). While "a trial judge 'retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial,' . . . we have cautioned that '[r]equests for such rulings should be granted only sparingly." Ibid. (alteration in original) (internal citation omitted) (quoting Cordero, 438 N.J. Super. at 484).

When Judge Carey denied defendant's motion to bar Janiw from testifying, he stated, "But I think that the finder of fact is entitled to hear this information in whatever context the trial judge allows it. But . . . I don't think I'm in a position to strike any of the report today . . . and, therefore, I'll deny that application." While Judge Carey denied defendant's motion to preclude Janiw's report and testimony, his comments indicate he was deferring any final ruling to the trial judge. Therefore, we find nothing improper in the trial judge's consideration of

defendant's motion to preclude Janiw's testimony, despite Judge Carey's previous order denying the motion.[6]

Alternatively, the Township argues the trial judge abused his discretion in granting defendant's motion to bar Janiw's testimony since he followed the methodology cited by this court in State v. Simon Family Enterprises, L.L.C., 367 N.J. Super. 242, 253 (App. Div. 2004), and directly rebutted Brody's testimony regarding financial feasibility. Defendant counters by attacking the methodology used by Janiw, arguing the "pro forma, land residual analyses" have been rejected by this court as inadmissible, citing Lustgarten. Defendant further argues that Janiw was not qualified to testify as to fair market valuations, as he was not a licensed real estate appraiser.

We have found it improper for an appraiser to project "a hypothetical building on vacant land, and capitalizing hypothetical income anticipated to be derived therefrom, without considering the multitude of unknown variables in erecting, leasing, operating and financing the project." State v. Mehlman, 118 N.J. Super. 587, 592 (App. Div. 1972). Additionally, we have

[6] However, considering the dispute over Janiw's qualifications and the admissibility of his opinions, the trial court should have held an N.J.R.E. 104 hearing to address these important issues. See Kemp, 174 N.J. at 432-33.

found attempts "to arrive at fair market value of vacant land by capitalizing income expected to be realized from buildings not yet built or financed was struck down as too speculative, being a serious departure from principle and an unsound approach." Ibid.

We previously addressed the use of expert testimony regarding the valuation of a vacant lot in Lustgarten. In that case, the Casino Reinvestment Development Authority (CRDA) condemned property located near the Atlantic City Convention Center, which was under construction at the relevant appraisal date. Lustgarten, 332 N.J. Super. at 478-79. We noted that "[i]n New Jersey, 'a court will not permit an expert to testify to the value of vacant land based on the projected income which could be earned from the operation of a building which might be erected thereon, because such a valuation is too speculative.'" Id. at 491 (quoting State v. F & J P'ship, 250 N.J. Super. 19, 26 (App. Div. 1991)).

The trial judge here found Janiw's testimony too speculative to allow, concluding that "Lustgarten . . . is controlling in this particular case despite Simon . . . ." We recognize that "the trial court has a wide range of discretion regarding the admissibility of proffered rebuttal evidence"; however, the ruling must not "unfairly prevent[] a plaintiff from attempting to rebut a material predicate of the defense theory testified to on the

defendant's case." Weiss v. Goldfarb, 295 N.J. Super. 212, 225-26 (App. Div. 1996), rev'd on other grounds, 154 N.J. 468 (1998).

We find the case under review distinguishable from Lustgarten. In contrast to the challenged testimony in Lustgarten, Janiw's proposed testimony did not concern an expert "picking a possible use." Lustgarten, 332 N.J. Super. at 491. Instead, Janiw's testimony would have addressed the specific mixed-use project proposed by defendant, and rebutted Brody's claim that the project was financially feasible. We further note Janiw's methodology tracked the methodology prescribed in Simon. 367 N.J. Super. at 253.

Regarding defendant's argument that Janiw lacked an appraiser's license, this fact should have gone to the weight of his testimony, not to its admissibility. Janiw's extensive experience in the financing of real estate transactions and the development of commercial and residential properties was inexplicably ignored by the trial court. Janiw was prepared to testify as to alleged flaws in Brody's appraisal method. This testimony was highly relevant to support plaintiff's challenge to defendant's evidence as to the value of the property.

Moreover, we note that the Janiw Report did not offer an opinion as to the value of the property. Instead, his testimony would have provided appropriate rebuttal evidence regarding

financial feasibility. The trial judge found Lustgarten controlling; however, Lustgarten only barred the method of projecting possible income for the valuation of property, not for financial feasibility.

Furthermore, as we explained in Simon, financial feasibility is determined by estimating future gross income from an expected use, and then subtracting "[v]acancy and collection losses and operating expenses . . . to obtain likely net operating income," and ultimately, the expected "rate of return on invested capital." Simon, 367 N.J. Super. at 253. Janiw would have presented such an analysis if the trial judge had not granted defendant's motion to preclude his testimony. We further stated in Simon that "as long as the opinions offered are not speculative or unreliable and do not fail as net opinions . . . they should be presented to the jury and tested through rigorous cross-examination." Id. at 254 (internal citation omitted). Thus, Janiw's proposed testimony was appropriate rebuttal testimony to challenge Brody's conclusion that the mixed-use project was financially feasible. Accordingly, the trial court mistakenly exercised its discretion when it barred Janiw's testimony.

The trial judge seemed to reason that because some of the same criticisms of Brody's methodology were raised during plaintiff's cross-examination of Brody, Janiw's rebuttal was

repetitive or unnecessary. However, an attorney's questions do not constitute evidence at trial. Arguably, Janiw's rebuttal testimony would have supplied appraisal standards from an expert witness that may have affirmed in the jurors' minds the relevancy and legitimacy of plaintiff's counsel's cross-examination of Brody. Because of the exclusion of Janiw's rebuttal testimony, there was no evidence in the record, for example, that Brody's failure to adjust for time or markets might have resulted in an inaccurate valuation. Where a rebuttal witness is prepared to offer non-repetitive, substantive testimony that directly attacks the value of defendant's expert testimony, "the exclusion of such testimony has the capacity of producing an unjust result." Lustgarten, 332 N.J. at 498 (citing R. 2:10-2). The error here requires a new trial.

Reversed and remanded. We do not retain jurisdiction.