

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

This opinion shall not "constitute precedent or be binding upon any court." Although it is posed on the internet, this opinion is only binding on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Law Division
Docket No. L-1722-14

NORTH HUDSON SEWERAGE AUTHORITY,
A Body Corporate and Politic of
The State of New Jersey.

Plaintiff

v.

Decision

HARTZ MOUNTAIN INDUSTRIES, INC.,
et. al.

Defendants

FILED

MAR 15 2019

Jeffrey R. Jablonski, P.J.Ch.

Decided: March 14, 2019.

John J. Curley for the Plaintiff (John J. Curley, LLC, attorneys).

Anthony F. DellaPelle for the Defendant, Hartz Mountain Industries, Inc. (McKirdy, Riskin, Olson & DellaPelle P.C., attorneys).

JEFFREY R. JABLONSKI, P.J. Ch.

After a non-jury trial, this court, on May 20, 2016, ordered North Hudson Sewerage Authority (NHSA) to pay \$569,774.61 in condemnation damages to Hartz Mountain Industries, Inc. (Hartz) for 4 easements taken by NHSA over Hartz's property known as the Estuary in Weehawken. The Estuary is a 582-unit luxury apartment complex located on the Hudson River with New York City views. In its written opinion, this court specifically did not award severance damages to Hartz.¹ Hartz sought review and the Appellate Division returned this matter to this court for factual consideration both of the compensation awarded for one of the easements and for severance damages.²

¹ This court previously concluded that severance damages were not appropriate factually because of a lack of proof of a "diminution in the total value of the property to justify an award." This court also held that the award of damages was legally inappropriate because this court found a lack of unity of ownership. The Appellate Division disagreed with this court's legal conclusion holding that "the trial court's conclusion that there was no unity of ownership because [the] 'Estuary is owned by three different entities, with Hartz possession only a 92.5% interest in that property' is incorrect." The Appellate Division did not, however, speak to the alternative factual conclusion made by this court and did not opine as to the correctness of that determination. This court assumes, therefore, that this remand is to permit that factual analysis.

² As part of case management following the remand, Hartz sought to reopen the record to permit additional testimony as to the issue of severance damages. NHSA objected and argued that since the pertinent parties had already testified both as to the entitlement of severance damages and the amount, or lack of it, and since each expert was subject to cross-examination on those opinions, that the record should be deemed closed. This court, could, therefore, "explain the foundation for its awards" on the existing trial record. This court agreed with the position advanced by NHSA since the Appellate Division did not order the record to be reopened on

Ultimately, after mediation, the parties agreed to the value and compensation for one of the takings. The parties were, however, unable to agree to the amount of severance damages.

The sole issue presented here is whether Hartz is entitled to severance damages as a result of the taking and, if so, how much.

Statement of Facts:

To address certain flooding concerns and to alleviate the health issues related to sewage accumulation, NHSA sought four easements over Hartz's property. Designated as Easements A, B, C, and D, those encumbrances were sought to construct and to maintain a sewer pipeline to manage stormwater runoff in Weehawken. Easements A and C were designated as "temporary" and were designed to permit access to and construction of component parts of the system that would be permanently installed on easements B and D. Easement B involved the installation, operation, and maintenance of a 96-inch sewer pipe that was located in the right of way of a private street owned by Hartz. Permanent Easement D is located across Harbor Boulevard in submerged land in the Hudson River. Permanent easement D was necessary to construct a sewerage outfall system that would consist of the construction of a platform above

remand to permit additional testimony beyond that which was already considered by this court. This court finds that the record created at trial was more than sufficient to comply with the remand instructions.

the Hudson River and the installation of a superstructure for sewer outfalls that would permit the discharge of storm water and treated sewage beneath the surface of the Hudson River and into it. The structure is known as a Solids and Floatables Screening Facility (SFSF).

Each new outfall constructed on this platform would have hidden netting chambers equipped with a system to catch floatables-solid objects larger than $\frac{1}{2}$ inch in diameter. The netting system would be accessed from the top of the platform and would be maintained by a truck and boom system that would remove and replace the nets periodically. According to the public notice issued by the Army Corps of Engineers, the SFSF would be capped with a platform that provides "a public viewing area that. . . overlook[s] the Hudson River and New York Skyline. Ornamental trees, benches, and decorative lighting would be installed in this public viewing area. Cleaning and maintenance access to the SFSF would occur from the private platform area via metal and concrete barriers." Renderings of the proposed construction reveal an aesthetic design plan consistent with the existing Hudson River Walkway.

To assess either the entitlement to severance damages, or the requested denial of them, the parties relied primarily on the testimony of their appraisers. Both considered the "before and after valuation" of the property pursuant to the severance damage

calculus with different results. See Borough of Harvey Cedars v. Karan, 214 N.J. 384, 417 (2013).

Hartz called Albert F. Chanese. As his testimony related to severance damages, Mr. Chanese noted (as to the construction of the SFSF and accompanying platform) that NHSA "will have the right to come in there and bring trucks, cranes, or whatever's necessary to lift this netting out, which will contain . . . raw sewer [sic] and debris, lift it up on the trucks, and cart it away as needed." In assessing the "before and after" valuation of the premises, he noted that before the SFSF he could "look out and I have an unobstructed view of the Hudson River and New York City. In the after, I will have a view of a giant septic system." Valuation of the taking, he opined, was determined based on the entire parcel when calculating severance damages. He also conceded that "not all units are affected. The units in the back don't have the view as the units in the front and really, the front ones that fact the river or have some type of river view are affected." He also acknowledged that if the platform were to be paved and covered and not opened at any time, the easement would have a minimal effect on the overall parcel.

Mr. Chanese rendered his opinion without previously visiting any facilities similar to the structure contemplated by the NHSA. He did not review the public notice that was issued by the Army Corps of Engineers about the SFSF. Further, he did not review any

plans nor any construction drawings for the SFSF. As to Easement D, he relied on "what was explained to him" that the SFSF was an open-sewer easement. NHSA characterized the entirety of his opinion evidentially infirm as "net." See Pomerantz Paper Corp v. New Cmty. Corp., 207 N.J. 344, 372-374 (2011).

In opposition, the NHSA called Paul T. Beisser. Mr. Beisser ultimately testified that that Easement D would not "impact upon the parent tract's utility, marketability, [nor] existing use." He described the SFSF as a "capture vault" that is comprised of a "series of three by three nets that will capture . . . floatables, and any cans, bottles, that sort of thing that make their way into the system." The vault, he noted, "will be underwater." On top "of the vault will be a deck with plantings and street furniture, which essentially [would be] an extension of the Hudson River Walkway which extends from this property down and through Hoboken and into Jersey City." He described permanent easement D as "that land underwater where the capture vault is going to go. [That] contains 17,875 square feet of land, which essentially, we can't do anything with [it] now, in the before, or in the after." The imposition of this and other permanent easements, he noted, does not have any adverse nor any reduction of density of the property. He also explained that "this is the land underwater where the capture vault's going to be placed. There's nothing being lost here, in my view. There was 17,875 square feet of land that

essentially has no value." On cross-examination by Hartz, he testified that Easement D would not have "any impact on the utility of the Estuary property." He noted, specifically as to Easement D, there might even be an improvement to the entire property. Specifically, before the SFSF was installed, the discharge of the outfall was uncontrolled through the existing bulkhead. The SFSF, with the platform extension of the Hudson River Walkway, now permits regulation of the outflow and more aesthetically pleasing management of it.

To provide this court with a description of the mechanics of the SFSF, NHSA called Shivani Patel, the engineer of record with CH2m Hill, the company that designed the SFSF. She testified that the NHSA service area consists of a combined sewer system. During normal dry conditions the sanitary flow from the sewerage system is directed to a plant for treatment and is then sent to the Hudson River. When it rains, the plant continues to accept the flow, but often reaches capacity because of the excess water. The SFSF assists with the diversion of flow through the outfalls. Most of the flow is storm water. However, it may also include bags, bottles, leaves and other "floatables." The SFSF captures these items within its chambers' nets. Flow valves are located under water and are not visible. The SFSF is capped by a platform that is level with the existing walkway. The netting chambers are accessed through removable hatches in its floor. In order to

"mimic" the existing pedestrian thoroughfare that it abuts, the platform would be "fully landscaped". Routine maintenance is necessary and involves the monthly replacement of the catchment nets. Additional replacements would also be necessary during particularly rainy periods. Ms. Patel detailed the hour-long replacement procedure: after the platform is cleared of pedestrians, a maintenance truck equipped with a crane would remove the nets from the open hatches and replace those full nets with empty ones.

The parties, at trial and again on the ordered reconsideration, submitted an easement valuation matrix. At the highest end of the matrix the greatest impact on the property was noted to be 90-100% of the fee and involved "overhead electric, flowage easements, railroad rights of way, irrigation canals and access roads. These were designated as having "severe impact[s] on surface use [and on] conveyance of future uses." Six other designations exist. The smallest percentage is that which is listed as 0% to 10% and represents "small subsurface easement[s]" that have a "nominal effect on use and utility."

The Parties' contentions:

NHSA argues that Hartz is not entitled to an award of severance damages since this perceived entitlement is based only on a purported adverse change of view. NHSA takes issue with the

testimony provided by Mr. Chanese and argues that his opinion lacks credibility about the visual aspect of the improvements that resulted in the argued valuation diminution to the Estuary. NHSA argues that that the testimony provided by its expert and buttressed by Ms. Patel was both competent and credible. The change in view to residents of the undetermined number of units of Building C of the Estuary located across Harbor Boulevard from the Easement D platform is not one which would lessen the quality of the New York City views.

Hartz argues that it is entitled to severance damages in the amount of \$2,910,000.00 as a result of the difference between the estimated "before" value of \$81,480,000.00 and the "after" value of \$78,570,000.00. The simple mathematical calculation results from what Hartz says are numbers that are validity generated from established valuation methods.

Conclusions of law:

Following a review of the evidence and a consideration of the overall credibility and reasonableness of the positions taken by the parties through its witnesses, this court does not find that Hartz is entitled to severance damages because there is no appreciable adverse impact on the parent parcel from the establishment of the SFSF on property that is actually undevelopable. Considering the testimony of each of the pertinent

witnesses in light of the easement valuation matrix submitted by the parties, this court does not find that there is any credible evidence to prove that the property taken as Easement D represents anything other than a small easement for which there is no appreciable adverse impact on the parent tract.

Severance damages represent compensation for the diminution of value of the property remaining after a taking. City of Ocean City v. Maffucci, 326 N.J. Super. 1, 13 (App. Div. 1999). In a situation "where only apportion of a property is condemned, the measure of damages includes both the value of the portion of land actually taken and the value by which the remaining land has been diminished as a consequence of the partial taking." Maffucci, 326 N.J. Super. at 15. Conceptually, therefore, it is necessary that

[an] examination of all of the characteristics of such remaining property after the time of the taking, as opposed solely to facts in existence at or immediately before condemnation, is inescapable. Therefore, in the case of a partial taking, the market value of property after a taking should be ascertained by a wide factual inquiry into all material facts and circumstances both past and prospective that would influence a buyer or seller interested in consummating a sale of the property.

Maffucci, 326 N.J. Super. at 19.

To ascertain "landowner's entitlement to severance damages, the fact finder henceforth shall consider competent evidence relevant to any conditions caused by the project that affect the remainder property's fair market value, insofar as such evidence is neither conjectural nor speculative." Borough of Harvey Cedars

v. Karan, 214 N.J. 384, 414 (2013) (citing with approval Los Angeles County Metropolitan Trans. Auth. v. Continental Dev. Corp., 16 Cal. 4th 694 (1997)). Only competent evidence should be considered and

speculative or conjectural benefits conferred on a property owner whose land is partially taken by a public project should not offset a condemnation award because such benefits would not factor into a calculation of fair market value. On the other hand, reasonably calculable benefits-regardless of whether those benefits are enjoyed to some lesser or greater degree by others in the community- that increase the value of property at the time of the taking should be discounted from the condemnation award.

Karan, 214 N.J. at 417.

The issue presented here concerns the amount of compensation, if any, due to Hartz. Therefore, the "burden of proof concept has no place in the inquiry." Paterson Redevelopment Agency v. Bienstock, 123 N.J. Super. 457, 459-460 (App. Div. 1973). However, expert testimony does.

As a general precept, expert testimony is generally required to determine the fair market value of real property. Pansini Custom Designs Assocs., LLC v. City of Ocean City, 407 N.J. Super. 137, 143 (App. Div. 2009). "Nevertheless, expert testimony need not be given greater weight than other evidence nor more weight than it would otherwise deserve in light of common sense and experience." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001). Significantly "a factfinder is not bound to accept the testimony of an expert witness, even if it is unrebutted

by any other evidence." Torres, 342 N.J. Super. at 431. The credibility of an expert and the weight or value to be accorded the expert's testimony lie within the exclusive province of the trier of fact. Cnty of Middlesex v. Clearwater Vill., Inc, 163 N.J. Super. 166, 173-74 (App. Div. 1978). A judge, as a fact-finder, is free to accept or reject all or part of an expert's testimony. Ibid.

Further, central to any determination in all litigation, and in this case in particular, is a consideration of the credibility of the witnesses that testified. The ultimate outcome of the issue presented in this matter centers squarely on the credibility assessments that this court is required to make as to the overall reasonableness of the positions taken by the parties. After an opportunity to hear the case, to see and observe the witnesses, and to hear each witness, this court has a unique perspective to evaluate the credibility and overall reasonableness of each witness' testimony. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). Additional guidance as to credibility findings is provided by the model jury charges. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil) 1.12(L) Credibility (Approved November 1998). Common sense and overall

reasonableness provide substantive lenses through which facts can, and should (especially in this matter), be assessed. Id.

Applying these principles, therefore, this court finds that as to the severance damages issue, the position advanced by the NHSA is more credibly supported than the position adopted by Hartz. Here, to support its claim for severance damages, Hartz relied exclusively on the testimony of Mr. Chanese. This court finds that his testimony, considered in a totality, represents only unsupported conjecture as to the existence of any severance damages. As noted by the NHSA, a review of Mr. Chanese's testimony is not supported by market data nor any other objective framework. The amount of severance damages appears to have been made based entirely on the entirety of the units at the Estuary as opposed to a more tailored analysis as to the specific units impacted by the construction. Additionally, as noted by the Plaintiff, the construction of the SFSF platform was certainly not an "open septic system" as the witness would like this court to believe. Rather, the SFSF hides its utilitarian function with an aesthetically pleasing extension of a structure that was already present and for which the residents of the Estuary were already aware. The fact that the renderings of the property were not reviewed and the primary basis of the asserted opinions further deprecate the positive credibility determination necessary to support the adoption of Hartz's position.

This witness seems also to mischaracterize the placement of the platform and to exaggerate the impact of it as to the view of New York City. He fails to account for the fact that the subject construction is dwarfed by an adjacent multi-story building that certainly obstructs the view of the city by some of the residents of the Estuary.

This testimony stands in marked contrast to Ms. Patel's very credible and reasonable testimony about the actual operation of the SFSF. As opposed to the Defendant's witness who merely speculated about the operation of the facility and pejoratively characterized it as a septic system without even considering the renderings of the facility, speaking with the construction individuals, nor examining other similar facilities, Ms. Patel has testified as to the minimal, if any, intrusion upon the existence of the SFSF on Hartz's property.

Further, as noted by Mr. Beisser, design of the Hudson River Walkway, for which the platform is an extension, is governed by specific design standards. Therefore, there would be no adverse construction elements that would be implemented to impact adversely on the construction and the platform would actually improve the premises. It can reasonably be considered that a hole in a bulkhead from which untreated outfall would flow replaced by a system that would disguise the outfall under water with the opportunity to arrest any further pollution of the Hudson River as

a result would be considered a benefit to the residents. This would also be combined with the extension of an existing recreational area. Both can only be considered benefits. Neither, however, represent an almost \$3 million value depreciation over land that could not be developed at all.

Finally, there is no evidence at all that there will be any additional noise beyond that which is attendant to urban living. Streets must still be swept and garbage collected with the use of machinery like that which would be employed by NHSA in its SFSF maintenance activities. This court would presume that any maintenance could be scheduled and also reasonably modified to minimize any inconvenience either to the residents of the Estuary or to the general public who might be using the walkway. Similarly, there has been no testimony provided that there would be any offensive odors caused by the operation of the SFSF. Finally, as noted by the NHSA, no physical intrusion, at all, would be experienced by occupants of the Estuary.

Conclusion:

This court has been tasked to determine whether severance damages should be awarded to Hartz as a result of the installation of operation of the SFSF in undevelopable land in the Hudson River. After a review of the trial testimony, the items submitted in support of the application on remand, and the consideration of the

arguments of counsel, this court does not find that severance damages are appropriate since there has not been a credible assertion of the depreciation of value to the parcel as a result of the taking to justify such an award.