

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: The Condemnation by the :
County of Allegheny, of a certain :
parcel of land, in the 5th Ward :
City of McKeesport, Allegheny County, :
now or formerly of HPT (McKeesport), :
L.P., for the Construction of the :
McKeesport South Flyover Bridge :
between Lysle Boulevard (SR 148) at :
Coursin Street and Industry Road :
:
Appeal of: Rite Aid of : No. 1213 C.D. 2012
Pennsylvania, Inc. : Argued: November 13, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge (P.)
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: March 20, 2013

Rite-Aid of Pennsylvania, Inc. (Tenant) appeals from the Order of the Court of Common Pleas of Allegheny County (trial court) which allocated condemnation proceeds under the Tenant's Lease with HPT, L.P. (Landlord).

Landlord is the owner of a commercial property in McKeesport, Pennsylvania, which was leased to Tenant for use as a retail store and pharmacy (Property). The Lease was entered into on May 28, 1998, and ends May 31, 2020, with Tenant having the option to renew.

On April 5, 2010, Allegheny County (County) filed a Declaration of Taking. The County condemned an area¹ of the Property for the new South Flyover Bridge between Lysle Boulevard (State Route 148) at Coursin Street and Industry Road. As a result of the taking, the Property no longer had signalized ingress and egress at the intersection of Lysle Boulevard and Coursin Street. The loss of the traffic light meant that only right turns in and out of the Property were permitted on the eastern access of the Property. In addition, the County took twelve parking spaces on the eastern side of the Property and another ten parking spaces which were located within a temporary construction easement. The taking also required that the advertising sign on the Property be relocated. The County offered Landlord \$1,645,350 as the estimate of just compensation for the taking.²

On October 1, 2010, Tenant filed a “Petition to Intervene and for Payment of Just Compensation” in the nature of a Rule to Show Cause. Tenant argued that it was entitled to the **entire** condemnation award for injury and/or destruction of its leasehold interest. The trial court ordered that an answer be filed, discovery be held, and also a hearing be held determine if the Rule should be made absolute or dissolved. A hearing was conducted on August 2, 3, and 4 of 2011. The issue between the parties was the allocation of the compensation proceeds. The parties maintained this was an issue under the Lease, in particular, Paragraph 13 entitled “Condemnation.”

¹ The County sought: .167 acres for the Required Right of Way; .082 acres for a Temporary Construction Easement for two years; .016 acres for a Permanent Drainage Easement; and removal of Rite Aid’s sign, concrete piers, and timer.

² On July 11, 2011, the Court granted the parties’ joint motion to accept the County’s tendered compensation and the monies were deposited in a private escrow fund held jointly by the parties.

13. Condemnation

(a) Tenant, promptly after obtaining knowledge of the institution of any proceeding for Condemnation, shall notify Landlord thereof and Landlord shall be entitled to participate in any Condemnation proceeding. Landlord, promptly after obtaining knowledge of the institution of any proceeding for Condemnation, shall notify Tenant thereof and Tenant shall have the right to participate in such proceedings. Subject to the provisions of this Paragraph 13 and Paragraph 15, Tenant hereby irrevocably assigns to Lender or to Landlord, in that order, any award of payment in respect of any Condemnation of Landlord's interest in the Leased Premises, except that (except as hereinafter provided) nothing in this Lease shall be deemed to assign to Landlord or Lender any award relating to the value of the leasehold interest created by this Lease or any award or payment on account of the Trade Fixtures, moving expenses and out-of-pocket expenses incidental to the move, if available, to the extent Tenant shall have a right to make a separate claim therefor against the condemnor, it being agreed, however, that Tenant shall in no event be entitled to any payment that reduces the award to which Landlord is or would be entitled for the condemnation of Landlord's interest in the Leased Premises. Notwithstanding the foregoing, Tenant shall be entitled to any award or payment on account of Tenant's leasehold interest under this Lease only in the event of a Condemnation described in Paragraph 13(b)(i)(A) and then only to the extent that when such award, added to all other awards to which Tenant is entitled hereunder, is subtracted from the entire award in respect to all interests in the Leased Premises, the remainder exceeds the amount set forth on Exhibit "D" attached hereto and made part hereof. (Emphasis added).

(b)(i)(A) If (I) the entire Leased Premises or (II) at least ten percent (10%) of the applicable Land or ten percent (10%) of the building constructed on the Land or any means of ingress, egress or access to the Leased Premises, the loss of which even after Restoration would, in Tenant's reasonable business judgment, be

substantially and materially adverse to the business operations of Tenant at the Leased Premises, shall be subject of a Taking by duly constituted authority or agency having jurisdiction, then Tenant shall, not later than ninety (90) days after a Taking has occurred, serve notice (“Tenant’s Termination Notice”) upon Landlord of Tenant’s intention to terminate this Lease on any Basic Rent Payment Date specified in such Tenant’s Termination Notice, which date (“Termination Date”) shall be no sooner than the first Basic Rent Payment Date occurring at least thirty (30) days after the date of such Tenant’s Termination Notice.

(c)(i) In the event of a Condemnation of any part of the Leased Premises which does not result in a Termination of this Lease, subject to the requirements of Paragraph 15, the Net Award of such Condemnation shall be retained by Landlord and Lender, and promptly after such Condemnation, Tenant shall commence and diligently restore the Leased Premises as nearly as possible to its value, condition and character immediately prior to such Condemnation, in accordance with the provisions of this Lease, including but not limited to the provisions of Paragraphs 11(a), 12 and 15, although Tenant shall not be obligated to expend more than the Net Award in so doing (such restoration following a Condemnation and restoration following a casualty is, as the context shall require, herein called a “Restoration.”) (Emphasis added).

(c)(ii) Upon the payment to the Landlord or Lender of the Net Award after a Taking which falls within the provisions of this Paragraph 13(c), Landlord and Lender shall, to the extent received, make that portion of the Net Award equal to the cost of Restoration (“Restoration Award”) available to Tenant for Restoration, in accordance with the provisions of Paragraph 15, and promptly after completion of the Restoration, the balance of the Net Award shall be paid to Tenant and all Basic Rent, Additional Rent and other sums payable shall continue unabated and unreduced.

Lease, May 28, 1998, ¶13(a), (b)(i)(A) and (c)(i) and (ii) at 16, 18; Reproduced Record (R.R.) at 112a, 114a.

Because the parties proffered different plausible meanings to Paragraph 13, the trial court treated the matter as one that potentially involved an “ambiguous” contract term. However, the trial court indicated that it had not yet reached the conclusion that the Lease was ambiguous, but nevertheless allowed the parties to present evidence of its meaning to aid interpretation, if necessary.

Landlord argued that Paragraphs 13(a) and (b) were controlling. Paragraph 13(a) generally provides that the Landlord, as owner of the Property, shall recover the condemnation award. The paragraph, however, also allowed Tenant to participate in condemnation proceedings and to recover an award upon establishing a diminishment of its leasehold interest or out-of-pocket expenses, subject to the requirement that the total Tenant award could not diminish the Landlord’s award.

Landlord argued that Paragraph 13(b) applied to a major condemnation situation where there was; (1) a total taking; (2) a partial taking involving at least ten percent of the property; or (3) the interference with any means of ingress, egress or access to the site. Landlord argued that the County’s condemnation met the requirements of Paragraph 13(b) because the County took twelve percent of the Property and eliminated a critical point of access. Landlord argued that under the Lease, if such a major condemnation would, in the Tenant’s reasonable business judgment, substantially and materially affect the Tenant’s business operations, even after restoration, then the Tenant was obligated to terminate the Lease. In that scenario, Paragraph 13(a) governed the allocation of

the condemnation proceeds based on a specific formula. Specifically, the Landlord would be entitled to receive compensation for the loss of its property value, at a minimum of 110% of the principal amount owed so it could pay its lender and generally be compensated for the diminished value of the property. In addition, the Tenant could pursue the condemnor for any damages to its lost leasehold interest.

Landlord further argued that in the event the Tenant decided not to terminate, and chose to proceed under Paragraph 13(c), it was required to restore the Leased Premises as nearly as possible to its pre-condemnation value, condition and character. Further, in proceeding under Paragraph 13(c) and not terminating the Lease, Tenant acknowledged that, in its reasonable business judgment, its business would not be materially impacted once restoration occurred. In the event Tenant was able to fully restore the property, under the terms of Paragraph 13(c), Tenant could receive the condemnation proceeds equal to the cost of restoration, plus whatever part of the award was left, if anything.

Tenant, on the other hand, argued that Paragraph 13(a) and Paragraph 13(b) were limited to a “total taking” which did not occur here. It was Tenant’s position that Paragraph 13(c)(i) governed. Tenant argued that under Paragraph 13(c) where a taking occurred that did not result in termination of the Lease, then the Tenant had the option to “restore” the property, in which event the entire fund belonged to the Tenant. Tenant maintained that it did, in fact, restore the Property by expending \$110,000 to relocate the signage, parking spaces and landscape.

Much testimony was offered by Tenant and contested by Landlord regarding whether Tenant restored the leased premises as nearly as possible to its value, condition and character immediately prior to condemnation.

Kevin Shreve (Shreve), Tenant's Director of Construction for the Central Region, testified there were three options: (1) do nothing; (2) flip the orientation of the building; or (3) construct additional parking at the rear of the building and keep the building's orientation. Hearing Transcript, August 2, 2011 (H.T.), at 156; R.R. at 427a. He explained that flipping the orientation of the building would involve major construction and interrupt business; therefore, it was not an option. H.T. at 156-157; R.R. at 427a-428a. Tenant's Real Estate Executive Committee made the decision to keep the orientation of the building and restore the area and parking spaces around the building. Shreve testified that the total cost for the restoration was \$110,457.

Tenant also presented the expert testimony of Dennis Cestra (Cestra), a certified real estate appraiser. Cestra opined that the restoration action taken by Tenant restored the Property as nearly as possible to its pre-condemnation value, condition and character. Cestra explained that before the condemnation, the Property had two curb cuts. Afterwards, the Property had a four-way full-service curb cut. H.T. at 207-208; R.R. at 478a-479a. Before the condemnation, the Property had 42 parking spaces. Afterwards, it had 43. Cestra testified that he believed that Tenant's restoration of the Property "actually enhanced" the value of the Property because "they picked up one more [parking] space" and because the new curb cut provided "better access" to parking and more spaces were located closer to the building. H.T. at 210-213; R.R. at 481a-483a.

Landlord presented the testimony of its real estate development expert, Dennis Troy (Troy). Troy testified that the traffic light, which had been removed as a result of the condemnation, resulted in the loss of a "great asset, characteristic" of the Property. H.T. at 362; R.R. at 633a. The traffic light

provided 100% access and allowed for safer turn zones. Troy proposed a restoration plan that would “flip” the entrance from the east side to the west side, segregate the drive-thru from parking lanes, provide parking near the entrance, and provide a full intersection. Troy testified that moving the western curb cut even further west would allow for a safer condition for vehicles turning left onto Lysle Boulevard than currently existed under Tenant’s plan. Troy did not believe that Tenant’s “expenditure of \$110,000 associated with the actual improvement plan constituted a diligent effort to restore the leased premises as nearly as possible to its value, condition, and character immediately preceding the condemnation.” H.T. at 371; R.R. at 642. He believed that “flipping” the building’s entrance would have restored the premises to its pre-condemnation condition and value.

At the conclusion of the hearing, the trial court determined that “there [were] various contradictions in Paragraph 13 of the Lease” and that Paragraph 13 was not “artfully crafted.” Trial Court Opinion, August 11, 2011, at 5.

However, the trial court did not find that Paragraph 13(a) was ambiguous. The trial court disagreed with Tenant that Paragraph 13(a) (which entitled Landlord to condemnation proceeds) applied only when there was a “total taking,” noting that there was no such “specific limitation...on its face.” Id. The trial court found that the last sentence of Paragraph 13(a) governed the allocation of the condemnation proceeds. The trial court rejected Tenant’s claim that Paragraph 13(c) applied simply because the condemnation “did not result in a termination of the Lease.” The trial court found that, even if Paragraph 13(c) applied to the situation because the condemnation “did not result in a termination of the lease,” Paragraph 13(c) did not apply because “the property was not restored

“as nearly as possible to its value, condition and character immediately prior to condemnation.” Id.

The trial court found that the principal owed to Landowner’s lender at the time of taking was \$1,258,135.99 and awarded 110% of this principal to Landlord. The trial court awarded Tenant the remaining funds, \$261,400.85, in recognition of its lost leasehold interest. The Order was docketed on August 12, 2011.

On appeal,³ Tenant argues that the trial court erred when it: (1) found that Paragraph 13(a) governed the allocation of the condemnation award; (2) determined that Tenant did not restore the Property as nearly as possible to its pre-condemnation value, condition and character; (3) determined that Tenant was not entitled to the entire condemnation award pursuant to Paragraph 13(c); and (4) provided Landlord a double recovery.

Lease agreements are contracts that must be interpreted under general contract principles. Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986). In construing the terms of a contract, a reviewing court must strive to

³ When reviewing the results of a nonjury trial, this Court must give great deference to the factual findings of the trial court. Recreation Land Corp. v. Hartzfield, 947 A.2d 771 (Pa. Super. 2008). A trial court’s findings concerning issues of fact should not be disturbed absent an error of law or abuse of discretion, and the evidence should be considered in the light most favorable to the verdict winner. Wilson v. Transport Ins. Co., 889 A.2d 563 (Pa. Super. 2005). If the record adequately supports the trial court’s reasons and factual basis, then the trial court did not abuse its discretion. See Ambrogi v. Reber, 932 A.2d 969 (Pa. Super. 2007). For questions of law, the scope of the appellate court’s review is plenary. Mirizio v. Joseph, 4 A.3d 1073 (Pa. Super. 2010). However, because the issuance of a rule to show cause is predicated on judicial discretion, a decision on a rule is reviewed for abuse of discretion and manifest unreasonableness. Commonwealth v. Auto Mart, Inc., 910 A.2d 171 (Pa. Cmwlth. 2006).

ascertain and give effect to the intent of the parties as found in the written contract. Department of Transportation v. Pennsylvania Indus. For the Blind and Handicapped, 886 A.2d 706, 711 (Pa. Cmwlth. 2005). A contract should not be interpreted in a way that leads to an absurdity or renders the contract ineffective to accomplish its purpose. Clairton Slag, Inc. v. Department of General Services, 2 A.3d 765 (Pa. Cmwlth. 2010).

“When a written contract is clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, ... which will be given its commonly accepted and plain meaning [.]” LJL Transp., Inc. v. Pilot Air Freight Corp., 599 Pa. 546, 962 A.2d 639, 647 (2009) (citations omitted); Kripp v. Kripp, 578 Pa. 82, 849 A.2d 1159 (2004).

However, when an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is patent, created by the language of the instrument, or latent, created by extrinsic or collateral circumstances. Insurance Adjustment Bureau, Inc. v. Allstate Ins. Co., 588 Pa. 470, 905 A.2d 462 (2006). “A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.” Id. at 481, 905 A.2d at 468–469. Whether a contract is ambiguous is a question of law. Riverwatch Condominium Owners Assoc. v. Restoration Dev. Corp., 980 A.2d 674 (Pa. Cmwlth. 2009).

I.

First, Tenant argues that the trial court erred because Paragraph 13(c) plainly provided that Tenant was to receive all condemnation proceeds because the Lease was not terminated and it remained obligated to pay full unreduced rent.

Therefore, Paragraph 13(c), and not Paragraph 13(a) or (b), determined the proper distribution of the condemnation proceeds.

The problem is that the Lease does not provide for a situation where the Tenant did **not** fully restore the premises to its pre-condemnation value, condition, and character which is what the trial court found to have occurred here. The Court agrees with the trial court's astute observation that there were inconsistencies in Paragraph 13 in this regard.

At first glance, Paragraph 13(c) would control because the Lease was not terminated after the condemnation. However, after scrutinizing the entire Paragraph, it is patently clear that Paragraph 13(c) applied only: (1) if the Lease was not terminated; **and** (2) the Tenant restored the Premises to its value, condition and character before the condemnation. The second prong was a factual issue, which the trial court, after considering the evidence, decided against Tenant.

By its clear language, Paragraph 13(c) applied only if both prongs were met. Only one was met here (the Lease was not terminated); therefore, the trial court did not err when it concluded Paragraph 13(c) did not control.

II.

Closely related to Tenant's first issue is the second. Tenant argues the trial court erred when it concluded Tenant did not "restore the premises to its pre-condemnation character, condition and value." Tenant contends that the relocation of certain parking spaces and performing landscaping restored the Property to its pre-condemnation condition. However, Tenant's argument does not address the before and after **value** of the Property. The parties both agreed that the

condemnation award, which reflected a \$1,645,350 reduction in value of the Property, was reasonable. There was a loss of a traffic light and access. That was undisputed.

The Lease clearly required the Tenant to restore Landlord's Property's physical condition and character, but also to a value that would keep the Landlord economically whole. The trial court simply did not agree with Tenant's experts that its decision to leave the orientation of the building as is, and its expenditure of \$110,000 to replace twelve parking spaces, a sign and landscaping was adequate to restore the Property to its value before the condemnation. Instead, the trial court credited the opinions of Landlord's experts who testified that "flipping" the building's entrance at a cost of over \$1 million would have restored the Property to its pre-condemnation value by reestablishing a prime access point and gain the benefits associated with a dedicated traffic light. In such a situation, under the Lease, the condemnation proceeds would go to the Tenant to reimburse it for its restoration expenses, and Landlord would be left with a Property that was equal or close to the value it was before the taking.

The trial court's findings were amply supported by sufficient credible evidence.

III.

Next, Tenant contends that the trial court erred when it found that Paragraph 13(a) governed the allocation of the condemnation award. Again, this Court must disagree.

Tenant suggests that even if it failed to meet the Paragraph 13(c) restoration standard, it was still entitled to recover the **entire** award under that same provision. This position is contradicted by the Lease language and contrary to Pennsylvania eminent domain law.

As noted, if a major condemnation occurred, Tenant was not permitted to proceed under Paragraph 13(c) unless it reasonably believed that such restoration would restore its business operations to a pre-condemnation level. As the trial court found, Tenant failed to fully restore the premises to Lease standards.

Construing the Lease as a whole, the trial court then looked to Paragraph 13(a) which plainly gave Tenant the right to prove damages through evidence of a loss of its leasehold interest, with the remainder of the award going to Landlord, as the owner of the Property, **for the loss of the value to its property** as a result of the taking.

In Pennsylvania, in the event of a partial condemnation, as here, when a tenant remains under the lease, a tenant is entitled to recover “the difference between the fair market value of its leasehold interest immediately before the partial taking and the fair market value of the leasehold interest remaining immediately after the taking, projected over the remaining term of the lease and discounted to present worth.” Graham Reality Co. v. Pennsylvania Department of Transportation, 447 A.2d 342, 344 (Pa. Cmwlth. 1982).

Despite Tenant’s failure to present evidence on the amount of damage for the loss of its leasehold interest, the trial court placed Tenant in the same position it would have been had it proceeded under Paragraph 13(a) and 13(b)

(instead of improperly proceeding under Paragraph 13(c)) and awarded Tenant the maximum amount of damage for the loss of its leasehold interest. The trial court awarded the majority of the condemnation proceeds to Landlord which reflected the fact that Landlord was left owning a property of significantly decreased value.

When interpreting a contract, the trial court was required to adopt a construction “which under all circumstances ascribes the most probable, reasonable and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished.” Maloney v. Valley Med. Facilities, 946 A.2d 702, 708 (Pa. Super. 2008). All of the provisions of the Lease must be read together in a fair and reasonable manner, which demonstrates the parties’ likely intention and gives the effect to each provision. Lesko v. Frankfort Hospital-Bucks County, 609 Pa. 115, 15 A.3d 337 (2011).

Here, the trial court’s interpretation took into account all of the provisions of the Lease and the express purpose of Paragraph 13 which was to apportion condemnation damages among the fee simple owner and tenant in accordance with eminent domain law.

IV.

Finally, Landlord did not, as Tenant claims, receive a “double recovery.” Tenant claims that it was unfair that Landlord received the bulk of the condemnation proceeds as well as continued unreduced rents from Tenant. Tenant claims that to award Landlord the \$1.645 million (which represented the diminution in value of the building) while Landlord continued to receive full rent from Tenant after the condemnation, was imbalanced and not what the parties intended.

Prior to the condemnation, Landlord owned a Property valued at \$2,350,000 and received full rent from Tenant. After the condemnation, the value of the Property was significantly reduced to \$700,000. The trial court awarded Landlord compensation for the diminution in value of the Property because after the taking, Landlord was left with a property with a substantially reduced value. These are the very damages the Lease addressed in the event of a condemnation award. There was no double recovery.

The trial court is affirmed.

BERNARD L. McGINLEY, Judge

Judge McCullough did not participate in the decision in this case.

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:
Appeal of: Rite Aid of : No. 1213 C.D. 2012
Pennsylvania, Inc. :

ORDER

AND NOW, this 20th day of March, 2013, the order of the Court of
Common Pleas of Allegheny County in the above-captioned matter is hereby
affirmed.

BERNARD L. MCGINLEY, Judge