2016 IL App (3d) 150201-U

Order filed August 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, Plaintiff-Appellee, v. CHICAGO TITLE LAND TRUST COMPANY, as successor trustee to Founders Bank as Trustee under Trust Agreement dated January 4, 2002, and known as Trust Number 6005; FIRST FARM CREDIT SERVICES, FLCA, as mortgagee; NON-RECORD CLAIMANTS and UNKNOWN OWNERS, Defendants (Chicago Title Land Trust Company, Defendant-Appellant).	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Appeal No. 3-15-0201 Circuit No. 14-ED-37 Honorable Roger Rickmon, Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of a traverse and motion to dismiss by a landowner in eminent domain proceedings was affirmed on appeal because the defendant failed to request discovery that was relevant to the motion. The directed verdict in favor of the condemning authority was upheld because the only evidence of just compensation for the taking of a temporary easement was provided by the condemning authority's appraiser, and the circuit court's evidentiary rulings were not an abuse of discretion.

¶ 2 Defendant landowner appealed from a directed verdict in consolidated condemnation cases brought by plaintiff Enbridge Energy, Limited Partnership, to acquire easements across multiple properties for the construction of a liquid petroleum pipeline.

¶ 3 FACTS

¶ 4 On April 29, 2014, the Illinois Commerce Commission (ICC) granted the plaintiff, Enbridge Energy, Limited Partnership (Enbridge), a certificate of public convenience and necessity to construct, operate, and maintain a 36-inch diameter liquid petroleum pipeline and a certificate in good standing to operate the pipeline. The route of this new "Line 78" pipeline would run for approximately 77 miles in Illinois, largely parallel to an existing Enbridge pipeline. The ICC found that the route of Line 78 was reasonable. The ICC authorized Enbridge under section 8-509 of the Public Utilities Act (220 ILCS 5/8-509 (West 2012)) to take or damage private property under the law of eminent domain.

¶ 5 Enbridge reached agreements with many of the landowners, but, relevant to this appeal, could not reach an agreement regarding just compensation with two property owners in the path of Line 78: Elizabeth Bauer (the Bauer property, Case No. 3-15-0202) and the Chicago Title Land Trust Company (the Hanno property, Case No. 3-15-0201)(the current appeal). Enbridge filed condemnation complaints regarding both properties. The cases were consolidated in the trial court, and later consolidated on appeal, but the appeal in the Bauer case was dismissed after

the parties reached a settlement. Thus, the Hanno property is the only property at issue in this appeal, but we will refer to the Bauer property in setting forth the factual background.

¶ 6 Bauer responded first to the condemnation complaint by filing a traverse and motion to dismiss, arguing that there was no need, nor authority, to take the property and that Enbridge had failed to make a *bona fide* pre-suit good faith offer. At a hearing discussing the traverse motion, Bauer's counsel asked for discovery necessary to argue the traverse motion. However, the only discovery that defense counsel requested was to depose Enbridge's appraiser and information regarding settlement offers between Enbridge and other landowners. The circuit court ruled that the deposition of the appraiser was not going to be relevant to the issues raised in the traverse. The circuit court did order Enbridge to turn over information about settlement offers and payments for other similar tracts taken in Will County. While the traverse motion was then still pending, Enbridge filed an emergency motion to limit discovery and for a protective order over all documents and information regarding settlement offers with other Will County property owners.

¶ 7 The circuit court denied Bauer's traverse and motion to dismiss, finding that there was nothing presented to challenge the rebuttable presumption created by the ICC's order, nor any evidence presented to refute Enbridge's showing that its offer was made in good faith. The circuit court concluded that the affidavits and exhibits offered by Enbridge were sufficient to meet its burden to show that its offers were made in good faith and that the defendant offered no evidence to refute it. With respect to the emergency motion to limit discovery, the circuit court acknowledged the prior order by the court that Enbridge produce a record of all payments for acquisitions for the project in Will County, but specifically limited that discovery to the current litigation. None of those documents were provided prior to the hearing on the traverse.

¶ 8 Thereafter, a traverse and a motion to dismiss was filed regarding the Hanno property, arguing essentially the same things. The circuit court denied the Hanno motion for the same reasons. Both parties then filed answers and counterclaims for damages to the remainders. Enbridge filed motions to strike and dismiss the answers and counterclaims. The circuit court struck the answers with prejudice and struck the counterclaims without prejudice. The defendants responded by filing amended counterclaims.

¶ 9 Enbridge filed a number of motions *in limine*, which the circuit court largely granted, seeking to bar the testimony of landowners on a different pipeline, testimony by the defendants regarding the value of the easements or damage to the remainder, testimony regarding Enbridge's financial worth, and lay witness testimony regarding the stigma attached to pipelines or the fear of a leak. The circuit court ruled that Bauer could possibly testify as to her opinion of the value of her land, if it was determined that she had a sufficient basis for that opinion.

¶ 10 The two cases proceeded to a consolidated trial. On the first day of trial, March 23, 2015, defense counsel was served with Enbridge's answer to the amended counterclaims in both cases. Defense counsel contended that was the first time that the answer was received, even though Enbridge's counsel contended that the answer was hand-delivered in open court on March 19, 2015. The proof of service indicated personal service on that date, and transcripts from the hearing on March 19 indicate that defense counsel knew there was an answer filed but that he had not yet seen it. The circuit court denied the defendants' motions to strike the trial setting and to strike the answer as untimely, finding that Enbridge had leave of court to file the answer. The circuit court also denied the defendants' request for the jury to view both properties because the defendants did not arrange for a bus and stated that they would not pay for it. Since the Bauer

case has been settled on appeal, we will only recount the testimony relevant to the Hanno property.

¶ 11 Randall Gann, a licensed land surveyor, testified that there were no permanent easement rights being sought for the Hanno property, only a temporary workspace easement of 0.109 acres and an additional workspace area of 0.229 acres. Line 78 was actually located to the north of the Hanno property. Gann did the survey and certified the plat of the Hanno property.

¶ 12 John McKay testified for Enbridge that the land was being sought for the Line 78 project that carried crude oil and went through about 135 properties in Illinois. The pipeline would cross the Bauer property, would be located at least five feet below the surface, and it would be located north of the Hanno property. McKay testified that the temporary easement would be for two years, although work would not be going on at each property for the entire two years. Enbridge's appraiser, Joseph Batis, testified that he determined the whole value of the Hanno property to be $250,000. The remainder value was the same because there was no permanent taking. In his opinion, compensation for the two year temporary easement was $700, based upon a rate of return on investment approach.

¶ 13 John Hanno testified that he was building a house on the Hanno property, where he ran an organic farm. The defense did not call a real estate appraiser to testify at trial. In fact, Hanno made no effort to show any qualified opinion as to the value of the temporary easement. Enbridge moved for a directed verdict, arguing that the only testimony regarding just compensation was that of Batis and seeking a verdict for the temporary easement over the Hanno property in the amount of $700. The circuit court granted the motion. The circuit court also directed a verdict in the Bauer case, awarding just compensation in the amount of $200 for the permanent easement and $300 for the temporary easement. The defendants in both cases

appealed. However, as previously noted, the Bauer case settled while pending on appeal, and the appeal was dismissed, so the only matter before us is the Hanno appeal.

¶ 14 ANALYSIS

¶ 15 The defendant argues that the traverse motion was not the equivalent of a section 2-619 (735 ILCS 5/2-619 (West 2012)) motion to dismiss and the circuit court erred in denying the motion without discovery or an evidentiary hearing. The defendant also argues that the circuit court abused its discretion in granting Enbridge leave to file an untimely answer to their counterclaim. Lastly, the defendant contends that the circuit court's evidentiary rulings at the consolidated trial were in error.

¶ 16 A traverse and motion to dismiss challenges the plaintiff's right to condemn the defendant's property and will be granted when the plaintiff cannot show its right to condemn by proper proof. *Village of Cary v. Trout Valley Ass'n*, 282 Ill. App. 3d 165, 169 (1996). When such a motion is filed, the plaintiff bears the burden of establishing a *prima facie* case as to any disputed allegations. *City of Chicago v. Midland Smelting Co.*, 385 Ill. App. 3d 945, 965 (2008). Generally, a trial court's ruling on a traverse and motion to dismiss is subject to a manifest weight standard of review. *Department of Transp. ex rel. People v. Hunziker*, 342 Ill. App. 3d 588, 593-94 (2003), as supplemented on denial of reh'g (Sept. 10, 2003). With respect to discovery, we review a trial court's decision for an abuse of discretion. *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 516 (2010).

¶ 17 The defendant contends that the circuit court denied it discovery regarding Enbridge's eminent domain authority. However, although allegations regarding that authority were raised in the motion, the defendant failed to request discovery on those issues. Instead, discovery was sought on the issue of whether Enbridge made good faith offers, i.e., to depose Batis. The order

denying Hanno's motion relied on the order denying Bauer's motion, in which the motion to traverse and dismiss was denied because the affidavits and exhibits offered by Enbridge met its burden to show that its offers were made in good faith and the defendant offered no evidence to refute it. Thus, our ability to review is limited by the defendant. While we recognize the right for discovery in support of a traverse motion, defense counsel in this case fell short of providing us with the record to allow the defendant to prevail. Since the traverse motion was essentially limited to the issue of good faith, there was no manifest error in denying the motion.

¶ 18 The defendant filed amended counterclaims for damages to the remainder on January 28, 2015. Enbridge's answer was untimely as of March 3, but Enbridge was granted leave to file on March 18, 2015. The defendant had notice of the hearing, but did not appear because the hearing was noticed as a hearing on a motion for rule to show cause against a non-party. As noted in the fact section, defense counsel received the answer on the first day of trial, although the proof of service indicated hand delivery on March 19, the same day that defense counsel acknowledged in court that an answer had been filed. The circuit court found that the action was on the daily trial call, which defense counsel was aware of, when Enbridge's motion to file an answer was granted. A trial court has discretion in permitting the untimely filing of pleadings, so we would review that decision for an abuse of that discretion. *Perona v. Volkswagon of America, Inc.*, 2014 IL App (1st) 130748, ¶ 28.

¶ 19 We find no abuse of discretion, nor any prejudice in allowing the filing of the answer. Section 2-610(b) of the Code of Civil Procedure provides: "Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny." 735

ILCS 5/2-610(b) (West 2012). Under this section, the allegations of damages to the remainder were not admitted even if Enbridge failed to file an answer to the counterclaim. Also, it is clear from the record that the existence of damages to the remainder caused by the temporary easement was already an issue in the case. Thus, the defendant's claim of prejudice, that this failure of an answer shifted the burden of proof on the existence of damage to the remainder to the defendants, is incorrect. The defendant always had the burden of proving the damages alleged in its counterclaim. See *Rush v. Leader Indus., Inc.*, 176 Ill. App. 3d 803, 806 (1988) (burden of proof rests with the defendant bringing the counterclaim to establish all elements of its separate cause of action so damages are not recoverable without some evidence as to amount).

¶ 20 With respect to the trial, we review a trial court's evidentiary rulings for abuse of discretion. *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 67 (2007). The defendant contends that Hanno should have been allowed to testify as to the value of the Hanno property as the landowner. The circuit court ruled that because there was no permanent taking of the Hanno property, Hanno would not be permitted to testify as to the value of the property or damage to the remainder. The circuit court ruled that should be by expert testimony.

¶ 21 The defendants cite to *Department of Transportation v. White*, 264 Ill. App. 3d 145 (1994), wherein the landowner was allowed to testify as to the value of the land before the taking and to the damage to the remainder. *White*, 264 Ill. App. 3d at 151. That court stated that the landowner was generally qualified to express an opinion of the land value by virtue of his ownership. *Id.* at 153. The determination of the market value of real property is a question of fact, and witnesses need to have some means of determining value in order to testify. *Trunkline Gas Co. v. O'Bryan*, 21 Ill. 2d 95, 98 (1960). Enbridge acknowledges that this is the law, but argues that Hanno was not qualified to give an opinion of value for a variety of reasons.

¶ 22 There is no permanent taking in the Hanno case because the pipeline was actually on a neighboring property. The only issue was the effect of the 2-year construction easement. To recover for damage to land not taken, the damage must be direct and proximate and not a mere possibility of a remote or contingent injury. *Trunkline Gas Co. v. O'Bryan*, 21 Ill. 2d 95, 100 (1960) (temporary consequential interference with the use of property occasioned by the construction of a public improvement is not a proper element of damage). The measure of damages in the case of land not taken is the difference between the value of the property unaffected by the improvement, and its value as affected by it. *Trunkline Gas Co*., 21 Ill. 2d at 102.

¶ 23 In this case, Hanno relied on improper elements, such as speculative damages from a spill or to a honeybee farm that did not exist, rendering his testimony incompetent. See *Trunkline Gas Co.*, 21 Ill. 2d at 100. Since Hanno's disclosure and offer of proof did not address the specific damages to the .338 acre temporary easement, nor specified the source of that knowledge, there was no abuse of discretion in not allowing it. *Id.* at 101.

¶ 24 The defendant also argues that the circuit court abused its discretion in barring the testimony of landowners from other Illinois counties, because they proposed to offer admissible evidence and the door was opened by testimony by Enbridge's witnesses. The defendant contends that this testimony should have been admissible under section 10-5-50 of the Eminent Domain Act (735 ILCS 30/10-5-50 (West 2012)) and offered it to counter testimony by Enbridge that pipelines coexist with many properties. Both witnesses were disclosed as available to testify regarding a pipeline owned by Enbridge which ran across their properties and created an unsafe, unsanitary, and substandard environmental condition.

¶ 25 Evidence concerning other unrelated projects would only be admissible if there was a reasonable similarity between the projects. *Northern Illinois Gas Co. v. Wienrank*, 66 Ill. App. 2d 60, 74 (1965). While the projects are similar because they both involve pipelines, the record indicates that there was no showing of reasonable similarity between the pipelines, so there was no abuse of discretion in barring the testimony on that basis. Also, the defendant failed to call its retained expert witness to testify at trial and provided no offer of proof from the expert on establishing the relevance and effect of these issues on the value of the property subject to the easement. The circuit court specified that such expert testimony would be allowed if a proper foundation was established that related leaks or spills to the valuation of the property. Thus, the defendant waived any claim of error on this issue. See *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 561 (2004) (the failure to make an offer of proof regarding the exclusion of evidence results in waiver of the issue on appeal).

¶ 26 The record indicates that the circuit court did not actually deny the defendant's request for a jury inspection of the property, but rather stated that there was no request until the defendant made arrangements for the viewing and procured transportation. Section 10-5-45 of the Eminent Domain Act provides that "[t]he jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same." 735 ILCS 30/10-5-45 (West 2012). It is true that it is a statutory right, and it should be granted when requested. *Kankakee & S.R. Co. v. Straut*, 102 Ill. 666, 668 (1882). However, the opportunity to have a jury view the premises is an evidentiary issue and not a matter of constitutional a right. *Department of Business & Economic Development v. Phillips*, 43 Ill. 2d 28, 35 (1969). The defendant cites to no provision in the Eminent Domain Act to support the argument that it was the court's or Enbridge's responsibility to pay for the viewing when the defendant requested it.

¶ 27 Lastly, the defendant argues that it sought to introduce evidence of value and just compensation through a disclosed expert appraiser, Michael McCann, through the use of prior easement purchases and that the circuit court barred all evidence under the special value rule. However, the record actually indicates that the circuit court reserved ruling on whether the easement transactions outside of condemnation were special value and was going to take them on a case-by-case basis. The circuit court also limited McCann's testimony to what was disclosed. So, again, the defendant waived any claim of error on this issue. See *Sullivan-Coughlin*, 349 Ill. App. 3d at 561. We find that the circuit court did not abuse its discretion with respect to the evidentiary rulings, and we affirm the directed verdict in favor of Enbridge.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Will County is affirmed.

¶ 30 Affirmed.