

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1292-08T3

CITY OF LONG BRANCH,
a Municipal Corporation
of the State of New Jersey,

Plaintiff-Respondent,

v.

WEST OF PIER ASSOCIATES, LLC.;
CARMEN V. CICALSE, JR.;
ANTHONY M. CICALSE;
JENNIFER E. CICALSE;
PATRICK CICALSE; and
JAC CORPORATION,

Defendants-Appellants,

and

FEDERAL DEPOSIT INSURANCE
CORPORATION as Receiver for the
First National Bank of
Toms River, New Jersey;
REPUBLIC CREDIT CORPORATION;
SMALL BUSINESS ADMINISTRATION;
and AMERICAN BANKERS LIFE,

Defendants.

Argued December 15, 2009 - Decided August 5, 2010

Before Judges Skillman, Fuentes and Gilroy.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Docket No. L-1080-01.

Ronald S. Gasiorowski argued the cause for appellants (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski and Christie A. Gasiorowski, on the brief).

Paul V. Fernicola argued the cause for respondent (Paul V. Fernicola & Associates, LLC, attorneys; Mr. Fernicola, of counsel; Robert E. Moore, on the brief).

PER CURIAM

This is a real property condemnation action. On March 7, 2001, plaintiff City of Long Branch (the City) filed a complaint seeking to acquire title to property known as 74 Ocean Avenue, or Block 292, Lots 5.01, 5, 6, 20, 21 and 26, on the City's tax map (the property). Defendant West of Pier Associates, LLC, owned the property, and defendants, Carmen V. Cicalese, Jr.; Anthony M. Cicalese; Jennifer E. Cicalese; Patrick Cicalese; and JAC Corporation held secured interests in the property.¹ Defendants appeal from the September 30, 2008 order determining that pre-judgment interest on the condemnation judgment was to be calculated at the court rule rate, R. 4:42-11.² We reverse and remand for further proceedings consistent with this opinion.

¹ For the purpose of this opinion, we refer to those defendants collectively as the "defendants."

² As discussed infra, the order appealed from does not specify the amount of pre-judgment interest awarded on the underlying condemnation judgment, but rather only directs that "the amount of interest to be calculated shall be governed by Court Rule (continued)

I.

The core facts underlying this appeal are not in dispute. On April 27, 2001, the court entered an order for judgment appointing three condemnation commissioners. On May 3, 2001, the City filed a declaration of taking and deposited \$1,184,000 into court. On October 9, 2001, defendants filed an appeal from the commissioners' award.³

On October 6, 2006, the parties voluntarily dismissed the action, agreeing to submit the issue of fair market value of the property to binding arbitration before a panel of three arbitrators. On December 14, 2007, the arbitrators rendered their award, setting the fair market value of the property as of May 2001, at \$3,940,000. On inquiry as to whether the award was with or without interest, the arbitrators advised that interest would be allowed, either by application to the court or by the arbitrators if the court so ordered.

(continued)

4:42-11." Because "the amount of such interest . . . [was not] fixed and determined by the court . . . , and added to the amount of the award or judgment," the order is not final for purposes of appeal. Twp. of Piscataway v. S. Washington Ave., LLC, 400 N.J. Super. 358, 366 (App. Div. 2008). Nevertheless, because the parties fully briefed the issues, we grant leave to appeal nunc pro tunc. Caggiano v. Fontoura, 354 N.J. Super. 111, 125 (App. Div. 2002).

³ A copy of the condemnation commissioners' award is not contained in the appellate appendix.

On January 17, 2008, the City's designated developer paid defendants the difference between the amount of the award and the City's initial deposit, disbursing \$2,716,000 and \$40,000, on January 17, and January 22, 2008, respectively. On March 7, 2008, defendants filed a motion seeking to confirm the arbitration award and to schedule a hearing to determine the amount of interest the City owed on the award. On March 28, 2008, the court entered judgment confirming the arbitration award, and without conducting an evidentiary hearing, directed that interest be allowed on the judgment "pursuant to court rules."

On April 16, 2008, defendants filed a motion seeking reconsideration of that part of the March 28, 2008 order that allowed interest on the judgment at the court rule rate, and requesting a hearing to determine the appropriate interest rate. In furtherance of their motion, defendants attached a report prepared by Kristin K. Kucsma, an economist, setting forth several alternative methods of calculating commercial interest rates. After comparing the various commercial interest rates against the court rule rates from the time when the complaint was filed through entry of judgment, Kucsma opined that she did "not consider the court rule rates to be rates that would best indemnify the condemnee," because "the application of the court

rules rates is particularly unreasonable for the time period under consideration in this case, and would tend to penalize [the condemnee] unfairly." Rather, Kucsma opined that interest should be allowed on the judgment calculated at the ten-year U.S. Treasury rate with a markup of 290 basis points as a risk premium. On May 23, 2008, the court granted reconsideration, scheduled a hearing to fix the amount of interest on the judgment, and granted the City leave to submit an expert report.

On September 5, 2008, the City filed a certification from Hugh McGuire, the City's real property appraiser, comparing the average rate of interest under Rule 4:42-11 against the average rates of interest of one-year, ten-year, twenty-year, thirty-year U.S. Treasury rates, thirty-year fixed rates for residential mortgages, AAA corporate bonds, and the prime interest rate. McGuire opined that the interest rates allowed under court rule would provide "appropriate just compensation" to defendants.

On September 12, 2008, defendants filed a supplemental report from Kucsma, and on September 22, 2008, defendants filed a motion to bar McGuire's certification. In her supplemental report, Kucsma again opined that interest should be allowed on the judgment calculated at the ten-year treasury rate but with a markup for a risk premium of 290 basis point as reported by the

Federal Deposit Insurance Corporation to 350 or 450 basis points as charged by various mortgage lenders for similar type real property developments. It was her opinion, depending upon the risk premium basis points charged, that the interest owed on the judgment was between \$1,681,054 and \$2,418,788.

On September 26, 2008, without addressing the motion seeking to bar McGuire's certification, the court denied defendants' request for an evidentiary hearing, and determined that interest was to be calculated in accordance with Rule 4:42-11. On September 30, 2008, the court entered a confirming order. It is from this order that defendants appeal.⁴

On appeal, defendants argue that the trial court erred in denying their application for an evidentiary hearing to determine the rate of interest allowed on the judgment; abused

⁴ Shortly prior to oral argument, defendants filed a motion seeking to supplement the record with documents evidencing the City's payment of \$1,186,196.65 on April 2, 2009. Defense counsel wrote to the City's counsel the same day, acknowledging receipt of the interest check, but requesting advice as to how the interest payment was calculated. Defense counsel requested the City's counsel to advise the specific dates used by the City in calculating the interest. As of the date of oral argument, the City's counsel had failed to respond to defense counsel's April 2, 2009 letter. Thus, we requested the City's counsel to provide this court with a calculation of the April 2, 2009 interest payment. This information was not received until July 10, 2010. Because of the intervening time between payment of the arbitration award in January 2008, until payment of interest in April 2009, the City's counsel calculates that, if we conclude that defendants are entitled to interest on the interest paid, the City would owe an additional \$84,479.95.

its discretion in ordering interest to be calculated at the court rule rate, rather than at commercially-prevailing rates; failed to rule on their motion seeking to bar the City's expert's certification; and failed to enter a final order setting the total amount of the judgment, including the amount of interest allowed on the condemnation award.

II.

Defendants first argue that the trial court erred in denying their request for an evidentiary hearing to determine the appropriate rate of interest allowed on the judgment. Defendants contend that the court's determination that interest be calculated at the court rule rate resulted in the City paying \$500,000 less than what it would have paid at a commercial rate. We agree that the trial court should have conducted an evidentiary hearing in determining the appropriate rate of interest.

"[T]he allowance of interest on a condemnation award is a requirement of constitutional magnitude where the actual taking of the property is not contemporaneous with payment.'" Twp. of West Windsor v. Nierenberg, 345 N.J. Super. 472, 478 (App. Div. 2001) (quoting Casino Reinvestment Dev. Auth. v. Hauck, 317 N.J. Super. 584, 594 (App. Div. 1999), aff'd o.b., 162 N.J. 576 (2000)), certif. denied, 171 N.J. 443 (2002). Indeed, the right

of a property owner to receive interest on a condemnation award is implemented by statute. See N.J.S.A. 20:3-31 (providing that a property owner is entitled to receive interest on the compensation award from the date of the filing of the complaint until date of payment of compensation excluding, however, interest on all monies previously deposited into court or paid to the property owner). If the parties cannot agree upon the amount of interest owed, then interest "shall be fixed and determined by the court in a summary manner after final determination of compensation, and shall be added to the amount of the award or judgment, as the case may be." N.J.S.A. 20:3-32.

Although we are satisfied that by using the term "summary manner" in N.J.S.A. 20:3-32 the Legislature did not foresee the necessity of the court conducting a protracted and costly proceeding, Nierenberg, supra, 345 N.J. Super. at 480, we are equally satisfied that the Legislature did not "imply a proceeding devoid of evidential input." Twp. of Wayne v. Cassatly, 137 N.J. Super. 464, 474 (App. Div. 1975), certif. denied, 70 N.J. 137 (1976). Accordingly, depending upon the circumstances, an evidentiary hearing may or may not be required. In Cassatly, we directed the trial court to conduct

an evidentiary hearing to set the appropriate interest rate. In so doing, we stated:

Since rigid guidelines do not suffice and since the governing statute envisions a flexible approach, we start with the proposition that the appropriate rate of interest cannot be determined by an uninformed judge. Where, as here, the action has been pending for a substantial period of time in which the level of interest rates has been a changing phenomenon, a hearing should have been held during which expert evidence as to prevailing commercial and legal rates of interest would have been received. The statutory requirement that the rate of interest be determined "in a summary manner" does not necessarily imply a proceeding devoid of evidential input. After receiving evidence as to prevailing commercial interest rates, the prime rate or rates, and bearing in mind the applicable legal rates of interest, which should certainly be regarded as highly evidentiary, the judge should then select that rate or rates of interest which will best indemnify the condemnee for the loss of use of the compensation to which he has been entitled from the date on which the action for condemnation was instituted, less interest on all amounts previously deposited from the date of deposit. If no evidence is given as to the prevailing commercial rate, the court may conclude that the legal rate of interest reflects that rate, although the landowner is not entitled as a matter of right in all cases to an allowance of interest at the maximum legal rate. The interest rate selected should not, however, exceed the legal rate.

[Id. at 474-75 (citations omitted).]

Accord, Jersey City Redevelopment Agency v. Clean-O-Mat Corp., 289 N.J. Super. 381, 400 (App. Div.), certif. denied, 147 N.J. 262 (1996). However, in Hauck, we reached a different result, concluding that a trial court could decide the appropriate interest rate based upon certifications. 317 N.J. Super. at 595.

Here, the trial court concluded that it need not conduct an evidentiary hearing as it had received and considered expert reports addressing the issue from both parties. In determining that the court rule rate was an appropriate rate of interest to indemnify defendants for loss of use of the monies during the pendency of the condemnation proceeding, the court reasoned:

This is not a Cassatly case where the interest rates substantially increased during the pendency. Indeed, it's a Hauck case where the interest rates have remained relatively stable during the pendency of these proceedings. Indeed, from the time it started to the time it ended, it was right at the exact same rate court wise. 7.5 when it started and 7.5 when it ended and in between it went down and up. That's stability.

Initially, we express concern as to whether the trial court should have accepted McGuire as an expert on the appropriate rate of interest without first subjecting him to a Rule 104(a) hearing to determine whether he was qualified to testify as an expert on the subject. N.J.R.E. 702. Although defendants argue

on appeal that the trial court erroneously failed to address their motion seeking to bar McGuire's certification, we are not critical of the court's failure to do so. The hearing was conducted on September 26, 2008, and defendants did not file their motion until the day prior. The record is devoid of any evidence that the court was aware of the motion. With that said, assuming McGuire was qualified to testify, an issue we need not address on appeal, we are satisfied that the court mistakenly denied defendants' request for an evidentiary hearing.

The City filed its complaint on March 7, 2001, deposited \$1,084,000 with the court on May 3, 2001, and the court entered judgment confirming the arbitrators' award on March 28, 2008. Clearly, the condemnation proceeding was not of short duration. Rather, it extended over seven years. The difference in determining interest on the judgment at the court rule rate versus the rate suggested by defendants' expert, using the ten-year Treasury rate with a markup of 290 basis points as a risk premium, is approximately \$500,000. With such disparity between the rates, defendants were entitled to confront McGuire concerning his recommendation that the court use the court rule rate in fixing the amount of interest.

For example, McGuire noted that the court rule rates for years in which defendants were entitled to collect interest on the award, 2001 through 2008, were 7.5%, 8%, 5%, 4%, 3%, 4%, 6% and 7.5%, respectively for each year. McGuire noted the average of those rates for that eight-year span was 5.625%. However, in comparing the average court rule rate to the average rates of Treasury Bills, the prime rate, the thirty-year fixed home mortgage rate, and AAA corporate bonds, McGuire only averaged those rates for the years 2001 through 2007, a seven-year period. In so doing, McGuire's analysis may have unintentionally inflated the court rule rate when compared with the other rates. If McGuire had not included the court rule rate for 2008 of 7.5%, the court rule rate would not have averaged 5.625%, but only 5.357%. If the court had conducted an evidentiary hearing, defendants could have questioned McGuire as to whether his opinion that the "average of 5.625% [from] the Court Rule is an appropriate balancing of an adequate rate of return on an investment which maintain[s] safety of principal," would change if he had only averaged the court rule rate for a seven-year period as he did for the other rates.

A second area ripe for cross-examination was McGuire's failure to provide the court with evidence of the average commercial mortgage rate for the period in question. Although

McGuire provided residential mortgage rates and prime rates, he did not address the commercial mortgage rates for those years. Indeed, the trial court required the City to provide defendants with a copy of the promissory note executed by the City's developer secured by a mortgage on the subject property after the City filed its declaration of taking. The note disclosed that a bank lent the developer \$2,000,000 on August 8, 2002, with interest at the rate of prime plus 1.5%. By determining the interest rate without a short evidentiary hearing, the court denied defendants the right to cross-examine McGuire as to why he did not consider prevailing commercial mortgage rates of interest.

Accordingly, we reverse and remand for the court to conduct an evidentiary hearing to determine the appropriate rate of interest to be paid on the judgment pursuant to N.J.S.A. 20:3-31 and -32. If the City again offers McGuire as its interest rate expert, the court should conduct an N.J.R.E. 104(a) hearing as to his qualifications to testify on the subject. Because we reverse on defendants' first argument, we need not address the remaining arguments.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION