

REAL ESTATE

Leases Sometimes Condemning Tenants to an Unjust Fate

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Special to the Legal

In *Gutha v. Commonwealth of Pennsylvania*, the Commonwealth Court recently determined whether a provision contained in a lease precluded a board of viewers from hearing a tenant's claim for condemnation damages.

In Pennsylvania, tenants have standing to pursue damage claims in condemnation proceedings. Under the Eminent Domain Code, "[t]he claims of all the owners of the condemned property, including joint tenants, tenants in common, life tenants, remaindermen, owners of easements, or ground rents, and all others having an interest in the property, and the claims of all tenants, if any, of the property, shall be heard or tried together and the award of the viewers or the verdict on appeal from the viewers shall first fix the total amount of damages for the property, and second, apportion the total amount of damages between or among the several claimants entitled thereto." A board of viewers, therefore, not only determines the total market value of the condemned property but how it should be apportioned among the affected parties.

When the condemned property is subject to a lease, the interests of the landlord and tenant conflict because the more a tenant receives of the total condemnation award, the less the landlord as owner of the property receives.

Most leases include condemnation clauses to address this inherent tug-of-war. Some leases terminate upon condemnation in order to preclude the tenant from having a property interest that could be subject to condemnation proceedings.

In *Gutha*, the lease did not terminate upon the taking. Instead, under the condemnation clause contained in the lease, the tenant waived any interest in the condemnation award and could not independently participate in the condemnation proceeding. However, the tenant did not waive his right to receive damages for loss of goodwill.

Notwithstanding the terms of the condemnation clause, after the Pennsylvania Department of Transportation filed a declaration of taking to condemn the leased property, the tenant filed a petition for appointment of viewers. PennDOT thereafter filed preliminary objections to quash the petition on grounds that the leasehold interest was not compensable. In the preliminary objections, PennDOT referenced a letter from the landlord to the tenant directing the tenant to withdraw his petition in accordance with the condemnation clause. In the letter, the landlord also informed the tenant that it had stipulated to the preliminary objections filed by PennDOT.

The trial court sustained PennDOT's preliminary objections, quashed the tenant's petition and vacated the trial court's earlier ruling to appoint a board of viewers. The trial court concluded that the tenant had waived his claim for condemnation damages and was barred from participating in the condemnation proceedings. The tenant then appealed the trial court's ruling to the Commonwealth Court.

In a 2-1 decision, the sharply divided Commonwealth Court affirmed the trial court's ruling with respect to the general con-



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demnation damages and vacated and remanded the case for further proceedings with regard to the tenant's special damages claim.

The Commonwealth Court first reviewed whether the trial court erred in allowing PennDOT to rely on the language of the condemnation clause. The tenant claimed that PennDOT could not do so because it was not a party to the lease. The tenant directed the Commonwealth Court's attention to a line of cases standing for the proposition that only those who are parties to a contract may enforce its terms.

The Commonwealth Court found the cases cited by the tenant were inapplicable to governmental takings.

First, the Commonwealth Court pointed out that the cases dealt with private persons who sought to enforce the terms of a contract to his own private benefit. In contrast, according to the Commonwealth Court, the government does not seek to benefit from the condemnation clause in the lease because "the market value of the condemned property is what is, and it must be paid, without diminution by PennDOT." Thus, the Commonwealth Court believed that "the only question is which party or parties will receive that award of market value."

Second, the Commonwealth Court noted that PennDOT was not enforcing the lease, but rather was using it as evidence to determine which person was owed the market value of condemned property. Relying on Supreme Court precedent, the Commonwealth Court reaffirmed that PennDOT "is permitted to rely on the terms of the Lease to know what interests are affected and to whom it owes money."

Next, the Commonwealth Court disagreed with the tenant's contention that he did not waive his right to compensation for the condemnation of his leasehold and other interests. The tenant argued that the condemnation clause did not apply to his leasehold interest in the property. The tenant pointed out that the clause only referenced the "marketing premises." Rejecting this interpretation of the lease outright, the Commonwealth Court cited to another portion of the lease wherein "marketing premises" are identified as the entire property leased to the tenant.

The Commonwealth Court also reasoned that the tenant's interpretation of the lease would otherwise render the condemnation clause meaningless.

Finally, the Commonwealth Court

addressed whether the tenant waived his right to receive special damages from PennDOT. The tenant contended that even if he was not entitled to general condemnation damages, he was not precluded from claiming moving and related expenses allowed under the Eminent Domain Code.

The Eminent Domain Code establishes a right to special damages where a governmental taking leads to displacement of a business. A "displaced person" is defined under the Eminent Domain Code as any condemnor or other person who moves from real property or moves his personal property from real property due to a condemnation. According to the Eminent Domain Code, a displaced person may be entitled to payment of his moving expenses and reasonable expenses of searching for a replacement business and actual reasonable expenses of reestablishing a small business. Payment of such expenses is in the form of a reimbursement and is not due until the displaced person actually moves and submits receipts for the actual costs incurred.

The condemnation clause did not include language specifically excluding the award of special damages. Moreover, in the clause, the tenant actually preserved his right to claim damages for his loss of goodwill. As a result, PennDOT did not dispute the tenant's rights to special damages

under the Eminent Domain Code.

In fact, PennDOT acknowledged the tenant had the right to present evidence to support his claim for special damages. Instead, PennDOT asserted that, because the tenant did not present any documentation of expenses incurred to move his business or to reestablish a new business, he had failed to meet his burden with respect to these special damages.

The Commonwealth Court remanded the case with respect to the tenant's claim for special damages because it believed that he should have been given the opportunity to present any such evidence to the board of viewers.

In a strongly worded dissent, Senior Judge James Kelly believed that the trial court improperly quashed the tenant's petition to appoint the board of viewers.

Kelly questioned the majority opinion's reliance on cases where "the leases in question were not considered by the trial court in a preliminary manner as a preliminary objection to the appointment of a board of viewers but, rather, were either considered by the board of viewers to determine the amount of damages to be awarded to the various parties in interest, or in a challenge to the award of the board of viewers."

In Kelly's estimation, based upon the cited cases, the "[l]ease should have been considered by the board of viewers in the apportionment of damages under the relevant provision of Eminent Domain Code, and not as a means by which [PennDOT] could seek to quash [the tenant's] claim for damages." Kelly believed that "the trial court should have directed the board of viewers to address the application of

Real Estate continues on 10

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Real Estate

continued from 8

the lease to the apportionment of all damages under the relevant provisions of the code."

In his dissent, Kelly does not seem to suggest that he would have reached a different conclusion on the substantive issues. Rather,

Kelly merely disagreed with the appropriate forum.

Whether the condemnation clause should be considered by the trial court as the preliminary objection stage or by the board of viewers, *Gutha* clearly reinforces its importance to the landlord. Clauses of this type not only protect the landlord's ownership interest, but also simplify the entire condemnation process.

If the clause in *Gutha* had included a waiver of special damages, the board of viewers would have been required to award compensation only to the landlord. Because the tenant in *Gutha* will now be given the opportunity to present evidence regarding special damages, the condemnation proceedings will be complicated and the landlord's share of any award may be reduced.