

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PJ KING ENTERPRISES, LLC, :
 : C.A. No. 06C-12-024 WLW
Plaintiff, :
 :
v. :
 :
ANTHONY RUELLO, PATRICK :
W. JOYCE and LEWES REALTY, :
INCORPORATED, :
 :
Defendant. :

Submitted: June 20, 2008
Decided: July 1, 2008

Upon Defendants Patrick W. Joyce and
Lewes Realty, Incorporated's Motion for
Partial Summary Judgment on Damages.
Granted in part; Denied in part.

Richard L. Abbott, Esquire of Abbot Law Firm, Hockessin, Delaware; attorneys for
the Plaintiff.

Richard P. Beck, Esquire of Morris James, LLP, Wilmington, Delaware; attorneys for
the Defendant Anthony Ruello.

Eric M. Andersen, Esquire of Cooch & Taylor, Wilmington, Delaware; attorneys for
the Defendants Patrick W. Joyce and Lewes Realty, Inc.

WITHAM, R.J.

PJ King Enterprises v. Anthony Ruello, et al.
C.A. No. 06C-12-024 WLW
July 1, 2008

Before the Court is Defendants Patrick W. Joyce and Lewes Realty, Inc.’s (“Agent”) Motion for Partial Summary Judgment on Damages (hereinafter, “Motion *in limine*”).¹ The Court held an oral argument regarding this motion on June 20, 2008. Based on the following, the Court grants the motion in part and denies it in part.

Background

Discovery in this action is completed and trial is scheduled for July 14, 2008. Defendants have named an expert and Plaintiff has not. Plaintiff desires to call lay witnesses to testify to the amount of damages, some of which involve calculations and extrapolations usually reserved only for expert witnesses.

The controversy is rooted in Plaintiff PJ King Enterprises, LLC’s (“Plaintiff”) purchase of land on Bowers Beach for the purpose of building a vacation home. Plaintiff alleges that the prior owner of the land, Defendant Anthony Ruello, the real estate agent, Defendant Patrick W. Joyce, and the Agent’s realty, Defendant Lewes Realty, Inc., failed to disclose that the land contains wetlands as designated by the federal government.

Plaintiff alleges the following resulting damages: (1) loss of income, (2) diminution in value of the land and (3) economic and financial losses. Plaintiff purchased the land for \$208,000.00 and has listed the completed vacation home at

¹The nature of this motion is better characterized as a motion *in limine* since the motion requests that the Court limit the scope of damages that may be sought during trial rather than make a ruling on the damages. This conclusion was verified at the June 20 hearing.

PJ King Enterprises v. Anthony Ruello, et al.

C.A. No. 06C-12-024 WLW

July 1, 2008

\$599,000.00. Plaintiff alleges that he over paid for the land. He asserts that the land's estimated value was based on the value of land without wetlands and that land with wetlands has a lesser economic value. Agent provided an expert report stating that the land is worth the same whether it is designated with wetlands or not because the home that was built is similar to the other homes in the area and the lack of a concrete parking pad does not contribute in any material way to the value of a Bowers Beach vacation home.

The investment was delayed six months because of the federal order to remove the concrete parking pad and fill that was obstructing wetlands. Plaintiff alleges damages that include the cost of following this order. Additionally, Plaintiff alleges that the six-month delay prevented it from completing the vacation home while the market was still "hot," resulting in a loss of income. The property has not yet sold. Plaintiff alleges the resulting income loss on the dollar amount of \$495,000.00 "that is tied up in the land" and an expected 15.15% rate of return. Where this dollar amount came from is unclear. The 15.15% rate of return is apparently based upon the portfolio of Lea Tammi, another broker for Plaintiff.

Agent seeks the Court to limit the scope of damages that may be sought during the trial to those costs associated with the construction and engineering costs of removing the concrete parking pad and rule that Plaintiff cannot present testimony or evidence regarding alleged loss of income damages, on alleged diminution in value of the land, together with any economic or financial losses because Plaintiff lacks an expert witness.

Standard

Summary Judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² The facts must be viewed in the light most favorable to the non-moving party.³ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁴ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for a decision as a matter of law.⁵ When a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.⁶

Discussion

Plaintiff wishes to present lay witness testimony as to its loss of income, diminution in value of its land and its economic and financial losses. The Delaware Rules of Evidence, Rule 701 governs the scope of lay witness testimony. That rule limits testimony to opinions or inferences that are “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’

²Superior Court Civil Rule 56(c).

³*Guy v. Judicial Nominating Comm’n*, 649 A.2d 777, 780 (Del. Super. 1995).

⁴*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁵*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁶*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge”⁷ When this rule was adopted, the record owner rule survived.⁸

The record owner rule permits an owner of personal property to state their estimate as to its value.⁹ The record owner of real property may also estimate its value.¹⁰ The policy is that a property’s sentimental value is unique to the individual.¹¹ In the context of real property, the witness landowner must be familiar with the elements of the property and have knowledge of the value of the property in order to testify.¹² If the opinion is based on the fair market value of nearby similar properties, the owner’s familiarity with these properties must be established.¹³ If the owner’s perceptions of property value *are* based on scientific or specialized knowledge or skill, then they will rise to the level of an expert witness and will not be permitted to testify without appropriate notice to the parties and Court.¹⁴ The fact finder is

⁷D.R.E., Rule 701.

⁸*Eastern Shore Natural Gas Co. v. Glasgow Shopping Center Corp.*, 2007 WL 3112476, *2 (Del.Super.Ct., Oct. 3, 2007) (citations omitted).

⁹*Atwell v. RHIS, Inc.*, 2007 WL 625277, *1 (Del.Super. Feb. 14, 2007) (*citing Ligon v. Brooks*, 196 A. 200 (Del.Super.Ct.,1937)).

¹⁰*Wilson v. Pepper*, 1995 WL 562235, *5 (Del.Super.Ct., Aug. 21, 1995).

¹¹*Id.* (*citing Carello v. State of Delaware*, 2004 WL 2520905, *3 (Del.Super.Ct., Nov. 1, 2004)).

¹²*Eastern Shore Natural Gas Co.*, 2007 WL 3112476, *2 (*citing State v. 0.15 Acres or Land*, 164 A.2d 591, 593 (Del.1960)).

¹³*Eastern Shore Natural Gas Co. v. Glasgow Shopping Center Corp.*, 2007 WL 3112476, *2 (Del.Super.Ct., Oct. 3, 2007).

¹⁴*Id.*

responsible for weighing the value of this personal knowledge.¹⁵

In the case *sub judice*, Plaintiff may testify as to the value of its land, assuming that the appropriate foundation is first properly laid, and to the cost of removing the concrete pad, but that is all. The record owner rule does not extend to lay testimony beyond the owner's opinion as to the value of the land. Defendants have agreed to allowing testimony about the cost of removing the concrete pad. As a consequence, the Court holds that lay witness testimony may not address diminution in value or economic or financial loss. This testimony requires special skill or knowledge that is not appropriate for the lay witness.

Plaintiff cites to *Schaefer v. Byler*¹⁶ for authority on an owner testifying as to a property's diminution in value. That case is from a lower jurisdiction and is therefore is not binding on this Court. *Schaefer* cites to *Wilson v. Pepper*,¹⁷ a Superior Court case before a judge and not a jury. In *Wilson*, although the plaintiff testified as to his estimate of the diminution in value of his property, the Court qualified that testimony with the fact that he was allowed to do so only to the extent that he is really testifying as to his opinion of the value of the property. Plaintiff also testified as to the amount that the real estate appraiser estimated the diminution in value to be. Finally, an expert testified as to his expert opinion on the value of the land.¹⁸ The Court discussed varying degrees of credibility for the source of each

¹⁵*Id.*

¹⁶1997 WL 33471239, *3 (Del.Com.Pl., March 13, 1997).

¹⁷1995 WL 562235, *5 (Del.Super.Ct., Aug. 21, 1995).

¹⁸*Id.* at *6.

PJ King Enterprises v. Anthony Ruello, et al.
C.A. No. 06C-12-024 WLW
July 1, 2008

value cited.

That case did not actually allow the land owner to testify as to diminution in value, only as to his opinion of what he believes the value of his real property to be. *Wilson* did not carve a new rule or clarify an old one. It was a bench trial where rules are often relaxed, erring on the side of admissibility since jury confusion in that context is not a concern.¹⁹ The case *sub judice* is a jury trial, and the potential for jury confusion is high.

Additionally, Delaware law consistently holds that economic and financial damages require expert testimony.²⁰ The Court in *Empire Financial Services, Inc. v. Bank of New York (Delaware)*²¹ explained the policy behind this conclusion well in the context of lost profits: “It is axiomatic that a claim for lost profits requires evidence of lost revenues, minus the costs associated with generating those revenues.” The plaintiff then attempted to prove this using fact witnesses instead of expert witnesses, which “does not comport with the requirements of *Daubert*, Superior Court Civil Rules 702 and 705, or the legal requirements for lost profits.”²² Since Plaintiff is defined as a lay witness, he cannot testify as to diminution in value or economic and financial damages.

¹⁹See *Eastern Shore Natural Gas Co. v. Glasgow Shopping Center Corp.*, 2007 WL 3112476, *3 (Del.Super.Ct., Oct. 3, 2007).

²⁰*Empire Financial Services, Inc. v. Bank of New York (Delaware)*, 2007 WL 1991179, *4 (Del.Super.Ct., June 19, 2007).

²¹2007 WL 1991179, *4 (Del.Super.Ct., June 19, 2007).

²²*Id.* at *5.

PJ King Enterprises v. Anthony Ruello, et al.

C.A. No. 06C-12-024 WLW

July 1, 2008

Conclusion

Testimony shall be allowed with respect to the value of the property and the cost of removing the concrete parking pad, but denied as to any other aspect of loss of income damages, diminution in value of the land, and economic or financial losses.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution