IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. DEPARTMENT OF TRANSPORTATION;	)	
Plaintiff,	)	
v.	)	**Case No. 09-CV-452-TCK-TLW**
UNITED STATES OF AMERICA, SMALL BUSINESS ADMINISTRATION; CROW REAL ESTATE INVESTMENTS, LLC, a terminated Oklahoma limited liability company; CROW ENTERPRISES, LLC, an Oklahoma limited liability company, d/b/a Turnpike Chrysler Jeep Dodge; ARVEST BANK, a Foreign Corporation; and COUNTY TREASURER OF OTTAWA COUNTY, OKLAHOMA;	)	
Defendants.	)	

OPINION AND ORDER

Before the Court are Plaintiff's Motion for Partial Summary Judgment (Doc. 167), wherein Plaintiff State of Oklahoma, ex rel. Department of Transportation ("ODOT") moves for partial summary adjudication against Defendant Crow Enterprises, LLC ("Crow Enterprises"); and Plaintiff's First *Daubert* Motion (Doc. 168), wherein ODOT seeks to exclude the testimony of Dennis Hall ("Mr. Hall").[1]

I. Background

The following facts are undisputed. On October 27, 2004, Defendant Crow Real Estate Investments, LLC ("Crow Real Estate") owned a 4.85 acre tract of property ("4.85 acres") located

[1] Also pending before the undersigned are Plaintiff's Second *Daubert* Motion and Plaintiff's Motion in Limine. The Court will hear arguments on these motions during the pretrial conference.

in Ottawa County, Oklahoma.[2] Pursuant to a lease agreement ("Lease") dated October 27, 2004, Crow Real Estate leased the 4.85 acres to Crow Enterprises for the operation of a car dealership known as Turnpike Chrysler Jeep Dodge ("Turnpike Chrysler"). The Lease listed Crow Real Estate as the "Landlord" and Crow Enterprises as the "Tenant." Marc Crow ("Mr. Crow") executed the Lease as manager of both Crow Real Estate and Crow Enterprises (collectively "Crow Defendants"). The Lease was for a five-year term, beginning October 27, 2004 and expiring October 26, 2009. The Lease required monthly payments in the amount of $6,000 per month, subject to certain Consumer Price Index adjustments each year. The Lease permitted extension by written notice to Crow Real Estate, not later than six months prior to expiration of the Lease, or by April 26, 2009:

> Provided Tenant is not in default in the performance of any of its obligations under this Lease, upon written notice to Landlord not later than six (6) months prior to the expiration of the Term, Tenant shall have the option ("Extension Option") to extend the term of this Lease for a period of five (5) addition years ("First Option Term") immediately following the Term set out in paragraph 2 above . . .

(Pl.'s Mot. for Partial Summ. J., at Ex. A.) The Lease also contained the following provision regarding damages in the event of condemnation ("Condemnation Provision"):

> In the event of any condemnation or exercise of eminent domain, whether a total or partial taking, Landlord shall have the right to claim and have any and all damages regarding the Premises from the condemning authority.

[2] Some documents in this case, including Court orders, have referred to the total acreage as 5.16 acres. As reflected in the summary judgment record and the proposed Pretrial Order, the parties now agree that Crow Real Estate owned a total of 4.85 acres, 1.88 of which were condemned for public use by ODOT.

2d *Eminent Domain* § 232 (2004) (explaining that "a mere tenant at will . . . is generally not entitled to compensation for the taking of his or her interest").

The Court concludes that Crow Enterprises may not recover just compensation based on its status as a lessee or tenant. First, the Oklahoma Court of Civil Appeals, following the weight of authority, has held that tenants at will – even those with an identity of interests with their landlord – are not entitled to just compensation in the event of condemnation. The Crow Defendants argue that the existence of a prior written lease distinguishes this case from *S&S Properties*. However, the authority relied upon by the court in *S&S Properties* did not distinguish between (1) tenants at will with expired written lease agreements; and (2) tenants at will who never entered into any written lease agreement. Nor does the Court find any reason to do so in this case.

Second, the Condemnation Provision in the Lease expressly excluded Crow Enterprises from recovering just compensation in the event of a total or partial taking. Such agreements are generally enforceable unless found to be unconscionable. *See generally* Restatement (Second) of Property, Landlord & Tenant § 8.2 (1977).[6] Thus, even assuming the Court deemed Crow Enterprises as a tenant under a five-year written lease term (based on its interpretation of Oklahoma common law, estoppel as urged by the Crow Defendants, or some other principle), Crow Enterprises still would not be entitled to just compensation for damages to its leasehold interest. It would be an absurd result if expiration of the Lease created new rights for Crow Enterprises that did not exist during the life of the Lease.

[6] Mr. Crow signed the Lease on behalf of both entities, and the Crow Defendants have not argued that the Condemnation Provision is somehow unconscionable.

Finally, the Court rejects Crow Enterprises' argument that its claimed damages would be outside the scope of the Condemnation Provision because they are not damages to the "Premises." With respect to the damages described in paragraph 11 of Mr. Crow's affidavit – namely, the costs of reconfiguring the Turnpike Chrysler facility to preserve its level of business (*see* Crow's Resp. to Pl.'s Mot. for Partial Summ. J., Ex. 1) – this constitutes damage to the "premises." As explained above, "premises" is defined as the entire 4.85 acres and any improvements thereon. Although the facility is located on the remainder, the Condemnation Provision expressly precludes recovery for any and all damages to the entire "premises," whether in the event of a partial or total taking. With respect to the damages described in paragraph 12 – namely, the $29,750.00 in rent Crow Enterprises paid to ODOT (*see* Crow's Resp. to Pl.'s Mot. for Partial Summ. J., Ex. 1) – the Court agrees with ODOT that such claims are contractual in nature and may not be asserted as "just compensation" damages resulting from the taking at issue. Therefore, Crow Enterprises is not entitled to any just compensation damages based on its status as a lessee or tenant.

III. ODOT's First *Daubert* Motion

Mr. Hall, a certified real estate appraiser, authored two similar expert reports – one that was transmitted to Crow Real Estate on October 7, 2010 ("2010 Report") and one that was transmitted February 8, 2012 ("2012 Report"). The 2010 Report was authored based on the Amended Complaint and assumes a total taking of the 4.85 acres. Following the Second Amended Complaint, the Court set a new deadline of December 19, 2011 for the exchange of expert reports. On this date, the Crow Defendants again produced the 2010 Report but with an "update" consisting of a document entitled "Just Compensation" ("Just Compensation Document"). The Just Compensation Document, which the Crow Defendants intended as an addendum to the 2010 Report, states that (1) the value

of the 1.88 acre parcel is $307,916.92, and (2) damage to the remainder is "nominal PROVIDED the remaining site is reconfigured and refitted to maintain full utility of the facility." (Pl.'s First Daubert Motion, Ex. C.) On February 8, 2012, on the morning of Mr. Hall's deposition, the Crow Defendants provided the 2012 Report.

ODOT seeks to exclude (1) opinions in the 2010 Report on grounds of relevance, (2) the Just Compensation Document on grounds that it is not a stand-alone "expert report," and (3) opinions in the 2012 Report on grounds of untimeliness. In response, the Crow Defendants contend that the 2012 Report is "virtually the same as the combined [2010 Report] and [Just Compensation Document]" except with (1) "renewed information pertaining to the partial take square footage;" (2) an $83.08 difference in the amount of just compensation, and (3) a "better appearance." (Crow Defs.' Resp. to First Daubert Mot. 3-4.)

Because it is likely dispositive of the other two arguments, the Court begins with ODOT's third argument seeking exclusion of opinions set forth in the 2012 Report. The Court finds no cause for excluding the opinions set forth in the 2012 Report on grounds of untimeliness. Although Crow Real Estate did not provide the 2012 Report by December 19, 2011, it did timely provide the 2010 Report with the Just Compensation Document "update" setting forth an estimated value for the 1.88 acres. As argued by the Crow Defendants, the 2010 Report and Just Compensation Document – taken together – do not differ substantially from the 2012 Report. Mr. Hall's overall methods did not change, and his conclusions changed only slightly by $83.08. The changes are a permissible supplement rather than an entirely new, untimely report. Thus, the Court does not view the Crow

Defendants' conduct as total non-compliance with Federal Rule of Civil Procedure 26(a)(2), and the sanctions in Federal Rule of Civil Procedure 37(c)(1) are not implicated.[7]

IV. Conclusion

Plaintiff's Motion for Partial Summary Judgment (Doc. 167), construed as a motion for partial summary adjudication, is GRANTED as set forth in this Opinion and Order. Specifically, the Court holds that Crow Enterprises is not entitled to just compensation based on its status as a lessee or tenant.[8] Plaintiff's First *Daubert* Motion (Doc. 168) is DENIED, and Mr. Hall shall be permitted to testify in accordance with the 2012 Report.

SO ORDERED this 9th day of October, 2012.

Terence Kern

TERENCE KERN
United States District Judge

[7] Based on their arguments, the Crow Defendants do not appear to seek introduction of any specific opinions set forth *only* in the 2010 Report or the Just Compensation Document. Therefore, the Court does not reach ODOT's arguments related to such opinions. If necessary, the Court will address these during the pretrial conference.

[8] Based on the proposed Pretrial Order's inclusion of certain questions of law and fact that are not reached by this Opinion and Order, *see supra* note 4, the Court will not dismiss Crow Enterprises as a party.