

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001163-MR

BERNICE SHIPP

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 99-CI-006783

THOMAS LOGSDON; and
SHERRY LOGSDON

APPELLEES

OPINION

AFFIRMING IN PART, AND VACATING AND REMANDING IN PART

* * * * *

BEFORE: EMBERTON, Chief Judge; BUCKINGHAM and GUDGEL, Judges.

GUDGEL, JUDGE: This is an appeal from a judgment entered by the Jefferson Circuit Court in a case involving real estate and eminent domain issues. For the reasons stated hereafter we affirm in part, and vacate and remand in part.

Appellant Bernice Shipp was the owner of certain property, including a small retail building and a parking area, bordered by Shelbyville Road in Jefferson County. The property, hereinafter referred to as the original tract, was leased to a dry cleaning business until early 1997. Throughout the lease period Shipp and the lessee believed that Shipp's tract included an adjacent paved area, hereinafter referred to as the adjacent

tract, which was used for parking and for the placement of a sign identifying the business. However, it was later determined that the adjacent tract was owned by the state.

On July 28, 1997, Shipp and appellees Thomas and Sherry Logsdon executed a lease which included an option to purchase the original tract. The lease/option provided that "[i]f buyers exercise option to purchase said property - any money from state will be applied to purchase price of land at west end of building and seller will be out no expense." The lease period commenced on August 1, 1997, and the Logsdons utilized the adjacent tract for parking although all parties knew that the tract belonged to the state.

Meanwhile, plans were made for a major road renovation project affecting the portion of Shelbyville Road adjacent to Shipp's property. On September 12, 1997, the state offered Shipp \$65,900 for certain interests in the original tract, including \$2,900 for a temporary construction easement and \$63,000 for the parking area. Although the amount of compensation remained open for negotiation, on September 17 Shipp and the state executed a right of entry agreement whereby the state acquired possession of the original tract's parking area plus a temporary construction easement.

It is undisputed that because the right of entry agreement eliminated most parking spaces located on the original tract, that tract was rendered worthless for retail use unless the adjacent tract could continue to be used for parking. The parties had anticipated that Shipp would purchase the adjacent

tract, but the state's proposed purchase price of \$54,000 apparently far exceeded Shipp's expectation as to cost and no purchase was made. Moreover, although the Logsdons exercised their option to purchase the original tract in July 1999, Shipp refused to purchase the adjacent tract with the money which the state was to pay for the right of entry and easement. Because of the controversy over entitlement to that money, the state retained those funds. Eventually, the trial court concluded that the Logsdons were entitled to the benefit of the entire \$65,900 payable by the state. This appeal followed.

First, Shipp contends that the trial court erred by failing to fix a date of taking of the original tract which would establish the parties' respective rights to compensation. We disagree.

The record shows that the parties executed the lease/option agreement on July 28, 1997, which was some eight weeks before Shipp and the state executed the right of entry agreement. Although the lease/option document may have been inartfully worded by stating that "[i]f buyers exercise option to purchase said property - any money from state will be applied to purchase price of land at west end of building and seller will be out no expense," that specific wording nevertheless clearly takes precedence over general legal principles regarding the relative interests of buyers and sellers in eminent domain situations. Given the fact that the lease/option specifically mandated that any money paid by the state would be applied toward the adjacent tract's purchase if the Logsdons purchased the original tract, it

follows that the court was not required to determine the date when the original tract was taken by the Logsdons. Hence, the court did not err by failing to do so.

Next, Shipp contends that the Logsdons, as holders of "an unexercised option to purchase real estate on the date of taking by eminent domain," lacked "a compensable interest in the property." However, there is no merit to this contention since it is clear that the parties specifically provided by contract, in the clause quoted in the preceding paragraph, that the Logsdons would have a compensable interest in proceeds paid by the state for the original tract if they decided, at any time during the lease period, to exercise their option to purchase that tract.

Next, Shipp contends that the trial court erred by enforcing the agreed restriction on her right to receive the compensation to be paid by the state. We disagree.

As noted above, the parties specifically provided in the lease/option agreement that "[i]f buyers exercise option to purchase said property - any money from state will be applied to purchase price of land at west end of building and seller will be out no expense." Contrary to Shipp's contention, it is not fatal to the Logsdons' position that the state was not named as a party since the parties' dispute centers not on whether the state would pay compensation, but instead on the disposition of those funds and any property purchased with the funds.

Moreover, we are not persuaded by Shipp's assertion that the parties made a mutual mistake in the lease/option

agreement by failing to address the issue of whether Shipp was obligated to purchase and convey the adjacent tract to the Logsdons if they purchased the original tract. It was admitted that the original tract has little retail value unless the adjacent tract is available for parking, and that the adjacent tract has little value except for use in connection with the original tract. Given the absence of any real controversy concerning the relationship between the two tracts, the trial court did not abuse its discretion by resolving any ambiguity in the language of the lease/option agreement by finding that the parties agreed the adjacent tract would be purchased and conveyed to the Logsdons in the event they exercised their option to purchase the original tract. Indeed, this is the only construction of the agreement which makes sense, since the language of the disputed clause would be extraneous and unnecessary if the parties intended that Shipp would acquire and retain the adjacent tract for her own benefit regardless of whether the Logsdons exercised their option to purchase the original tract. It necessarily follows, therefore, that the only logical conclusion is that when the lease/option agreement was executed, the parties intended that the Logsdons, by the exercise of their option to purchase, would be entitled to acquire both the original and the adjacent tracts. Finally, we are not persuaded by Shipp's assertion that the lease/option agreement should be set aside because the purchase price of the adjacent tract greatly exceeded the anticipated purchase price. Indeed, it is clear that a mistake regarding a future event, such as the

proposed purchase here, does not constitute a material mistake which permits a contract to be set aside. See Restatement (Second) of Contracts §151 cmt. a (1981).

Next, Shipp asserts that even if the Logsdons are entitled to the adjacent tract, she is entitled to retain any amount by which the compensation payable by the state for the original tract exceeds the purchase price payable to the state for the adjacent tract. For the reasons stated hereafter, we vacate the court's judgment as to this issue and remand the matter for further proceedings.

KRS 416.660 provides:

(1) In all actions for the condemnation of lands under the provisions of KRS 416.550 to 416.670, except temporary easements, there shall be awarded to the landowners as compensation such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking, including in the remainder all rights which the landowner may retain in the lands sought to be condemned where less than the fee simple interest therein is taken, together with the fair rental value of any temporary easements sought to be condemned.

(2) Any change in the fair market value prior to the date of condemnation which the condemnor or condemnee establishes was substantially due to the general knowledge of the imminence of condemnation or the construction of the project shall be disregarded in determining fair market value. The taking date for valuation purposes shall be either the date the condemnor takes the land, or the date of the trial of the issue of just compensation,

whichever occurs first. (Emphasis added.)

Here, the right of entry agreement clearly provided that although the amount of compensation to be paid was still undecided when the agreement was executed, the state was immediately entitled to enter and possess the portion of the original tract which was described in the agreement. Thus, regardless of when the state may have physically entered the property, the taking of the property occurred and Shipp lost all right to use and possess that property on the date the agreement was executed.

Moreover, although the Logsdons acquired a lease/option on the property before the right of entry agreement was executed in September 1997, they were merely holders of an option to purchase which was not exercised until nearly two years later. As a result, they are not entitled to damages stemming from the taking except to the extent that their outstanding leasehold interest may have diminished the market value of the original tract prior to the execution of the right of entry agreement. See Gulf Interstate Gas Co. v. Garvin, Ky., 368 S.W.2d 309, 313 (1963); Commonwealth, Department of Highways v. Sherrod, Ky., 367 S.W.2d 844 (1963). Thus, the trial court erred by determining that the Logsdons are entitled to receive the difference between the amount paid by the state for the original tract and the purchase price of the adjacent tract, and that finding must be set aside. On remand, the court should determine the amount by which the compensation paid for the original tract exceeds the amount used to purchase the adjacent tract, and then value the

parties' respective interests in the original tract at the time the right of entry agreement was executed. The court should then divide the excess compensation in proportion to those respective interests. See Gulf Interstate, 368 S.W.2d at 313; Sherrod, 367 S.W.2d 844.

Finally, Shipp contends that the trial court erred by failing to award to her, rather than to the Logsdons, the amount paid by the state for the temporary easement. Again, we vacate the court's judgment as to this issue and remand the matter for further proceedings.

As stated above, KRS 416.660(1) provides that "landowners" shall be compensated for land permanently taken, "together with the fair rental value of any temporary easements sought to be condemned." Moreover, "the taking date for valuation purposes shall be either the date the condemnor takes the land, or the date of the trial of the issue of just compensation, whichever occurs first." KRS 416.660(2).

Here, the temporary easement was taken and the state acquired the right to enter the property when the right of entry agreement was executed in September 1997. This is true regardless of when the state physically entered the property. As the Logsdons clearly were lessees rather than "landowners" in September 1997, the trial court erred by determining that they were entitled to the entire amount awarded as compensation for the temporary easement. Instead, as noted above, on remand the court should value the Logsdons' interests in the compensation paid for the temporary easement by fixing the value of the

parties' respective interests in the original tract as of the date on which the agreement was executed, and it should then divide that compensation in proportion to those interests. See Gulf Interstate, 368 S.W.2d 309; Sherrod, 367 S.W.2d 844.

The court's judgment is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Henry K. Jarrett, III
Louisville, KY

BRIEF FOR APPELLEES:

Lester I. Adams, Jr.
Louisville, KY