

NOT DESIGNATED FOR PULICATION

BART JOHN GERACI * **NO. 2004-CA-0463**
VERSUS * **COURT OF APPEAL**
ORLEANS LEVEE DISTRICT * **FOURTH CIRCUIT**
BOARD OF
COMMISSIONERS, STATE OF * **STATE OF LOUISIANA**
LOUISIANA AND XYZ
INSURANCE COMPANY *
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-15319, DIVISION "H"
Honorable Michael G. Bagneris, Judge
* * * * *
Judge Patricia Rivet Murray
* * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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AFFIRMED

This is an inverse condemnation suit. From a judgment granting summary judgment in favor of the defendant, the Orleans Levee District Board of Commissioners (the “Board”), the plaintiff, Bart John Geraci, appeals. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 22, 1999, Mr. Geraci filed the instant lawsuit against the Board. At the time the suit was filed, he owned commercial property located at 6318 Hayne Boulevard in the City of New Orleans (the “Property”). In his petition, Mr. Geraci alleges that the Board’s construction of an overpass, adding a down ramp from Lakeshore Drive onto Hayne Boulevard, severely limited access to the Property. He further alleges that during the two-year construction period, his former tenant, E-Z Serve, operated a convenience store on the Property. As a result of the severe drop in business due directly to the “lack of available traffic passing in front of the current location” after the overpass was constructed, E-Z Serve terminated its lease. E-Z Serve’s stated reason for doing so was because the “property was on longer viable as a site for a convenience store.” Mr. Geraci alleges that the Property was thus “singularly affected” by the

construction of the overpass.

Based on these allegations, Mr. Geraci alleges that the Board is liable to him in damages based on two related theories. First, he alleges that the Board is liable under La. C.C. art. 667 for the use of its adjoining property to the detriment of Mr. Geraci in that the Board's use "has made plaintiff's property unsuitable for its prior use as a convenience store and has decreased the value of the property by nearly one-half." Second, he alleges that the Board's use of its property has resulted in a partial taking or inverse condemnation of the Property compensable under the Louisiana Constitution.

On January 4, 2000, three months after he filed this suit, Mr. Geraci sold the Property to a third party, whom he had leased it to after E-Z Serve's departure.

On August 29, 2003, almost four years after the suit was filed, the Board filed a motion for summary judgment. In support, the Board enumerated the following undisputed facts:

- Mr. Geraci owned the Property that is the subject of this lawsuit when suit was filed in September 1999.
- Mr. Geraci sold the Property on January 4, 2000, approximately three months after filing suit.
- Mr. Geraci has not pled physical damage to the Property, nor has he pled excessive or abusive conduct on the part of the Board.

- The Property is zone B-1, which means neighborhood business district.
- All of the commercial and residential properties in the neighborhood of the Property were similarly affected by the overpass.
- Before selling the Property to a third party, Mr. Geraci leased the property to the third party as a convenience store.
- The Property continues to operate as a convenience store to this day.

In opposing the Board's motion, Mr. Geraci introduced correspondence from E-Z Serve reflecting its reason for terminating the lease was the decline in business due to the construction of the overpass. He further alleges that although he was able to lease the Property to a third party after E-Z Serve's departure, the rent he received was lower. He also introduced a forensic economist's report reflecting that the value of the Property at the time he sold it had substantially decreased. Mr. Geraci alleges that the sales price he received reflected that substantial decrease in value caused by the construction of the overpass.

On January 5, 2004, the trial court granted the Board's motion and dismissed Mr. Geraci's suit with prejudice. This appeal followed.

STANDARD OF REVIEW

On appeal, the standard of review of a trial court's decision granting

summary judgment is *de novo*. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230; *Potter v. First Federal Savings & Loan Ass'n of Scotlandville*, 615 So.2d 318, 325 (La. 1993). Appellate courts thus ask the same questions as do trial courts in determining whether summary judgment is appropriate; those questions are whether there is any genuine issue of material fact, and whether the mover-appellee is entitled to judgment as a matter of law. *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/94), 639 So. 2d 730, 750. Appellate courts are also guided by the Legislature's admonition that "[t]he summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action" and that "[t]he procedure is favored and shall be construed to accomplish these ends." La. C.C. P. art. 966 A(2).

Another pertinent provision applicable when, as in this case, the mover is not the party that will bear the burden of proof at trial is La. C.C.P. art. 966 C(2); it provides:

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of

material fact.

La. C.C.P. art. 966 C(2).

On appeal, Geraci assigns as error the trial court's failure to find genuine issues of material fact exist as to his claims for damages based on both theories he asserts--inverse condemnation and La. C.C. art. 667. The Board counters that the trial court correctly granted summary judgment because Mr. Geraci failed to offer any evidence on the essential elements required for him to prevail on either theory he asserts.

DISCUSSION

This is an inverse condemnation action, *i.e.*, one in which a property owner seeks redress for the taking or damaging of his property in the absence of an expropriation action. *Constance v. State Through Dep't. of Transp. and Dev.*, 626 So.2d 1151 (La. 1993). Such an action is based on the self-executing nature of the constitutional command that the expropriating entity must pay just compensation when it takes or damages property. La. Const., art. 1, § 4; *State, Through Dep't. of Transp. and Dev. v. Chambers Investment Co.*, 595 So.2d 598, 602 (La. 1992). The expropriating entity's liability, however, has been limited "to those instances where there is a physical taking or damage to property or *a special damage peculiar to the particular property and not general damage sustained by other property*

similarly located.” Raymond v. State, Through Dep’t. of Highways, 231 So.2d 375, 383 (La. 1970)(emphasis supplied).

Absent a physical taking or physical damage, “general damage sustained by property as a consequence of public improvement, such as some degree of inconvenience, must be suffered and endured by owners of separate tracts for the benefit of the general public.” *Constance*, 626 So. 2d at 1157. Damages such as traffic noise, circuitous or more inconvenient route to a plaintiff’s property “even when these factors resulted in an actual diminution of market value of the property,” are not, in themselves, special damages and thus are not recoverable. *Raymond*, 231 So. 2d at 384.

In *Constance*, the Louisiana Supreme Court commented that “compensation will be limited to owners of property that has been expropriated, except in limited circumstances.” *Constance*, 626 So. 2d at 1157. However, quoting *Chambers*, the Court acknowledged the judicial trend toward “increasing acceptance of the possibility of takings without physical invasion” and cited as illustrative the judicial recognition of the right of street access as a form of property right. *Id.* (quoting *Chambers*, 595 So. 2d at 601-02). To determine whether a taking and damaging of such an abstract legal property right (like street access) has occurred, the *Chambers* court adopted a three-pronged analysis; to wit: (1) whether a person's legal

right with respect to a thing or object has been affected; (2) whether the property has been taken or damaged in a constitutional sense; and (3) whether the taking or damaging was for a public purpose. *Chambers*, 595 So. 2d at 603.

Because it will provide a framework for addressing the issue presented on this appeal, we discuss in detail the Louisiana Supreme Court's analysis and application of the *Chambers* test, as well as the *Reymond* test, to the facts in *Constance*.

In *Constance*, Cleary Bicycle, Moped & Go-Cart Center, Inc. ("Cleary") claimed it suffered economic damages as a result of the restricted access to its property caused by the reconstruction of the I-10 exit ramp to Clearview Parkway by the State Department of Transportation and Development ("DOTD"). At the outset, the Supreme Court framed the issue presented as "whether restricted access to property with accompanying reduction in property value and temporary loss of business income triggers the entitlement to compensable damages." *Constance*, 626 So. 2d at 1152. The Supreme Court noted that the appellate court affirmed the trial court's award of damages to Cleary, finding that the damages it suffered as a result of the restriction of access "exceeded the level of ordinary inconvenience and are peculiar to plaintiffs, since Cleary was the only retail business in the

area to be affected by the construction.” *Id. at 1155*. Disagreeing, the Supreme Court reasoned that Cleary satisfied neither the *Chambers* test nor the *Reymond* test.

As to the *Chambers* test, the Court assumed that street access is a property right that had been affected by DOTD’s actions and that a public purpose was involved; thus, the first and third prongs of the test were assumed to be satisfied. Focusing on the second prong, the Court stated that in determining if a taking or damaging of a property right has occurred, it is necessary to consider the respective rights of neighboring landowners as set forth in La. C.C. arts. 667 and 668. The Court noted that Articles 667 and 668 limit a landowner’s right of ownership and “require that he tolerate some inconvenience from the lawful use of a neighbor’s land.” *Constance*, 626 So. 2d at 1155. Finally, the Court stated its conclusion in *Chambers* that “where there is no allegation or evidence of personal injury or physical damage to property, a finding of liability under Article 667 ‘require[s] proof of the presence of some type of excessive or abusive conduct.’” *Id.* (quoting *Chambers*, 595 So. 2d at 605). Noting that Cleary had proved neither physical damage to property nor excessive or abusive conduct by DOTD, the Court found there was no taking of Cleary’s property rights under the *Chambers* test.

Likewise, the Court concluded that Cleary failed to establish that there was special damage peculiar to its particular property. In so finding, the Court reasoned:

The access to and traffic flow by all of the property in the Northeast quadrant of the Clearview Interchange was restricted by the construction and by the permanent re-routing of traffic by this project. While Cleary may have been the only retail business among its immediate neighbors, it cannot be suggested that the damage is peculiar to Cleary. The loss occasioned by the restricted access for each individual property may vary, but the difference is one of degree only. Since the damage was suffered by those in the general neighborhood, it is not compensable.

Constance, 626 So. 2d at 1158.

Turning to the instant case, the Board does not dispute the first and third prongs of the *Chambers* test; thus, the issue is whether the second prong is met. Because Mr. Geraci has neither alleged nor established a physical taking or physical damage to the Property and because the record is devoid of any evidence suggesting that the Board's conduct was excessive or abusive, we find there was no taking of his property rights under the *Chambers* test.

As to the *Reymond* test, Mr. Geraci argues that the Property sustained special damage peculiar to it and unique from the similarly situated properties in the area, alleging that the nature of the business conducted on

the Property causes it to be singularly affected by the overpass. He argues that a convenience store is unique in that it is dependent on the heavy volume of traffic in front of it and the ease of ingress and egress from the store to provide it with a client base. He still further argues that the other businesses similarly situated on Hayne Boulevard (a doctor's office and an insurance agency) are not in the same position because they do not rely on traffic volume to provide their client base. For the same reason, he argues that the Cleary bike shop involved in the *Constance* case was not in the same position. He stresses that the cause of E-Z Serve terminating its lease was that the construction of the overpass decreased the flow of traffic and thus decreased the business. As he puts it, the construction of the overpass has taken the convenience out of the convenience store. We find this argument disingenuous. Although the Property may have been the only convenience store among its immediate neighbors, it cannot be suggested that the damage caused by the restriction in access is peculiar to the Property. Rather, the damage was suffered by all the commercial and residential properties in the general neighborhood, and it is not compensable.

Finally, Mr. Geraci argues that there was a taking of the right of access to the Property based on the following footnote in *Constance*, which reads:

With regard to access, a survey of American law indicates that any governmental activity that totally landlocks a parcel is a taking. If the loss of access is less complete, it is suggested that a compensable taking has occurred should there be substantial or unreasonable diminution of access to the road system. Some courts have defined a substantial loss of access as one which renders the land unsuitable for the highest and best use it previously had, and the reasonableness question has turned upon the purpose for which the limitations occurred. A suggested analysis requires that the property right of access be defined as the capacity of an abutting owner to have reasonable ingress and egress and a determination of whether governmental activity has denied it to him. Accordingly, a taking has occurred if a governmental entity diminishes the owner's access to the point where it is no longer reasonable, in which case the owner is entitled to compensation.

Constance, 626 So. 2d at 1157, n. 6. Mr. Geraci's claim is that the Board's construction of the overpass substantially impaired the access to the Property and thus deprived the Property of its best use as a convenience store. We find this argument erroneous, legally and factually.

Legally, a public body has the right, pursuant to its police power, to divert traffic without subjecting itself to liability. *Constance*, 626 So. 2d at 1156 (citing *Ramelli v. City of New Orleans*, 233 La. 291, 96 So. 2d 572, 574 (1957)). Although the jurisprudence has recognized a narrow limitation on the right to divert traffic by acknowledging a property owner has the right to access to its property that is reasonable, "a property owner has no protectable interest in [a particular]. . . traffic flow, as opposed to access."

Constance, 626 So. 2d at 1156 (citing William B. Stoebuck, *Nontrespasory Takings in Eminent Domain* 70 (1977)). Here, Mr. Geraci's claim is based more on the alteration of the traffic flow than on the right of access.

Factually, Mr. Geraci has failed to establish that the Property has been deprived of its highest and best use or that it has been deprived of reasonable access as a result of the construction of the overpass. As to access, photographs presented at the summary judgment hearing reflect that vehicles using the Haynes off-ramp are met with a solid white line that prevents them from making a right turn into the parking lot of the convenience store located on the Property; before the overpass was constructed, vehicles were able to do so. Mr. Geraci stresses that in order for the vehicles exiting the overpass to access the Property, they now must turn right at the corner past the convenience store and travel 0.8 miles around the block through a residential neighborhood. However, this altered access to the Property affects only traffic exiting the overpass onto Hayne Boulevard. Neither traffic using the ground-level portion of Hayne Boulevard, nor local traffic from the surrounding residential neighborhood has been affected by the construction of the overpass. It follows then that there clearly is reasonable access to the Property after the construction of the overpass.

Moreover, the Board's construction of the overpass has not rendered

the Property unsuitable for its highest and best use as a convenience store. To the contrary, photographs introduced by the Board in support of its summary judgment motion reflect that the third party, who purchased the Property from Mr. Geraci after this suit was filed, was still operating the Property as a convenience store at the time of the motion was heard. The fact that the Property continues to be operated as a convenience store further evidences the existence of reasonable access.

Based on the above *de novo* review, we find the trial court did not err in granting the Board's motion for summary judgment.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED