STATE OF MICHIGAN

COURT OF APPEALS

TELETECH INC, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 19, 2013
v	No. 305937 Genesee Circuit Court
CITY OF FLINT, Defendant-Appellee/Cross-Appellant.	LC No. 10-094069-CH

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Plaintiff, Teletech Inc., appeals as of right an order granting summary disposition to defendant, City of Flint, in this governmental taking case. Defendant cross-appeals, arguing the trial court erred in rejecting its claim that plaintiff's damages are too speculative to support its claims. We affirm in part, reverse in part, and remand the case for further proceedings consistent with this opinion.

This case arises out of defendant's condemnation of the Genesee Towers Building (the building) in Flint, Michigan. On February 1, 1986, plaintiff entered into a long-term lease with Kumar Vemulapalli (the landlord) to lease the roof of the building for the purpose of licensing the space to telecommunication providers. The lease agreement provided the lease would continue through January 31, 1996, with a month-to-month lease to follow. On October 30, 1999, plaintiff and the landlord extended the original lease to continue through January 31, 2010.

On August 1, 2006, plaintiff and the landlord again modified the lease agreement. The modification stated an initial lease term, to expire on July 31, 2011. However, the modification provided for an extension of the lease's end date if the landlord allowed plaintiff to license space on the roof beyond July 31, 2011. In that case, plaintiff's lease would continue until 90 days after the license expired. At the time of the modification, plaintiff had a licensing agreement with Sirius Radio that would continue through September of 2018. Defendant thereafter won an arbitration award condemning the building, which this Court upheld in *Vemulapalli v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 287566). In *Vemulapalli*, a panel of this Court specifically upheld an arbitrator's decision that set the date of the taking at December 27, 2004.

Plaintiff first argues defendant's condemnation action terminated its leasehold interest, the termination constitutes a governmental taking, and defendant must compensate plaintiff for the taking. We agree.

This Court reviews a trial court's grant of summary disposition de novo. *Blue Harvest, Inc v DOT*, 288 Mich App 267, 271; 792 NW2d 798 (2010). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *BC Tile & Marble Co v Multi Building Co*, 288 Mich App 576; 794 NW2d 76 (2010). In reviewing the motion, this Court must consider "the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *BC Tile*, 288 Mich App at 583. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

This Court also reviews constitutional issues de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003). This Court also reviews issues of statutory interpretation de novo. *Chandler v County of Muskegon*, 467 Mich 315, 319; 652 NW2d 224 (2002). "When interpreting statutory language, [this Court's] obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Id.* In discerning legislative intent, this Court looks to the language of the statute. *Amy v MIC Gen Ins Corp*, 258 Mich App 94, 104; 670 NW2d 228 (2003), rev'd on other grounds *Stewart v State*, 471 Mich 692; 692 NW2d 376 (2004). When the statutory language is unambiguous, "the legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *Id.* When this Court finds that statutory language allows for alternative and reasonable constructions, this Court "must look to the object of the statute in light of the purpose for which the statute was enacted and apply a reasonable construction that effectuates the Legislature's purpose." *Id.*

On October 30, 1999, plaintiff and the landlord entered into a lease to continue through January 31, 2010. In 2003, plaintiff signed a license with Sirius, which was to extend through September of 2018. On August 1, 2006, plaintiff and the landlord modified the lease agreement to expire on July 31, 2011, or at the end of plaintiff's longest licensing agreement, whichever was later. Defendant argues that, because the arbiter established a date of taking of December 27, 2004, this extension was invalid because the landlord did not have title at the time of the agreement.

Defendant's condemnation of the building amounted to a governmental taking of plaintiff's leasehold interest. Generally, all interests in the property, including leaseholds, are terminated by a governmental taking. *A W Duckett & Co v United States*, 266 US 149, 151; 45 S Ct 38; 69 L Ed 216 (1924) ("Ordinarily an unqualified taking in fee by eminent domain takes all interests . . . . [A]n exercise of eminent domain founds a new title and extinguishes all previous rights."). Additionally, the termination of a leasehold qualifies as a taking for which the government must justly compensate the lessee. *Lookholder v State Hwy Comm'r*, 354 Mich 28, 35; 91 NW2d 834 (1958) (A leasehold and the rights derived from it constitute "property," the

taking of which is subject to compensation.); *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 134; 680 NW2d 485 (2004) ("Recovery can be had for the taking of a leasehold estate."). We hold that, because plaintiff retained a leasehold interest in the property at the time of the condemnation, and defendant did not join plaintiff in the condemnation proceedings or compensate plaintiff for its leasehold interest, defendant improperly took the interest without just compensation.

MCL 213.57 provides, in pertinent part:

> [T]he title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act.

This Court has stated that MCL 213.57 "must be construed as vesting title in [the agency] once a complaint for condemnation is filed." *Goodwill Community Chapel v General Motors Corp*, 200 Mich App 84, 88; 503 NW2d 705 (1993). As defendant concedes, defendant filed its eminent domain complaint on September 26, 2006.[1] Thus, because the landlord retained title to the building through September 26, 2006, the landlord and plaintiff's August 1, 2006, lease agreement was valid. This lease stated it would expire on July 31, 2011, or thereafter if plaintiff secured a licensee for a longer period. At the time of the agreement, plaintiff had a licensee, Sirius Radio, under contract through September of 2018. It therefore appears plaintiff's leasehold interest extended through September of 2018.[2] Defendant took this interest when it condemned the building and terminated all outside interests in the property.

Defendant attempts to avoid this result by arguing that, because the arbiter found a taking occurred on December 27, 2004, defendant gained title on that date and the landlord had no further interest to lease to plaintiff. Defendant, however, fails to cite any relevant authority for this proposition. Rather, the plain language of the statute states title vests in the agency at the time the complaint is filed. MCL 213.57. The statute, in addition, does not state that title relates back to the date of the taking in inverse condemnation cases. Because the language of the statute

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[1] Although the landlord originally brought an inverse condemnation suit, the landlord agreed to dismiss the suit when defendant filed its complaint for condemnation. *Vemulapalli v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 287566).

[2] Although it appears plaintiff and the landlord intended to extend the lease agreement through September of 2018, this remains a question of fact because the extension occurred after plaintiff entered into the licensing agreement with Sirius. Thus, the trial court should determine whether plaintiff and the landlord intended to extend the lease at the time of the modification. At the very least, defendant took plaintiff's leasehold interest from the date defendant filed its complaint, September 26, 2006, through the date the lease would have terminated absent the extension, July 31, 2011.

clearly and unambiguously provides that title passes at the time the complaint is filed, which occurred on September 26, 2006, we reject this argument.

We also reject defendant's argument that it has not taken plaintiff's interest because plaintiff remains in the building and has not yet been evicted. Defendant concedes that the condemnation terminated plaintiff's leasehold and plaintiff's continued occupation of the building brought about a tenancy at sufferance. However, defendant argues that, because plaintiff remains in the building, a taking has not yet occurred. To the contrary, plaintiff originally had a lease agreement extending through 2018, and therefore, had the legal right to possess the leased space in that building until 2018. Because of defendant's action, plaintiff only retains the right to remain in the building for 30 days, subject to proper notice by defendant that it must relinquish possession. Thus, although plaintiff retains physical possession of the building, defendant's action constituted a taking of plaintiff's legal right to retain that possession until 2018. Defendant's argument, in essence, conflates the issue of damages with the issue whether defendant has legally taken plaintiff's interest. Although plaintiff will have suffered less damages because defendant did not evict plaintiff, defendant must compensate plaintiff for the taking of its leasehold interest.

Plaintiff next argues the trial court erred in granting defendant summary disposition because it presented a question of fact regarding whether defendant's actions amounted to an inverse condemnation of plaintiff's leasehold interest. We agree.

To establish an inverse condemnation, a plaintiff must show that (1) the defendant's actions substantially contributed to the decline in value of the plaintiff's property and (2) the defendant abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). The governmental action that constitutes a "taking" is broadly construed, and does not require an actual physical invasion of the property. *Id*. One of the factors in determining whether a taking occurred is whether "the governmental entity abused its exercise of legitimate eminent domain power to plaintiff's detriment." *Id*. (quoting *Heinrich v Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979)). Further, a plaintiff alleging inverse condemnation must prove a causal connection between the government's action and damages. *Id*. A plaintiff alleging an inverse condemnation must prove "the government's actions were a substantial cause of the decline of his property's value" and "establish the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Id*.

Plaintiff's property interest in the building was a leasehold for a term of years, presumably extending through September of 2018. Because of defendant's actions, plaintiff retains only a tenancy by sufferance, or a month-to-month leasehold interest. Thus, plaintiff suffered a substantial loss in the value of its property: it lost the right to retain physical possession of the leased premises through the period of the lease. Plaintiff, in addition, claims that defendant's actions caused the property to become less marketable to licensees due to defendant's action in boarding up the building and failing to maintain the property after it took title. This remains a question of fact regarding whether defendant's actions caused a decrease in the value of plaintiff's leased space, or whether plaintiff failed to gain licensees for other reasons.

The government, further, abused its legitimate powers of eminent domain by condemning the building without compensating plaintiff for its interest in the building. Plaintiff has presented evidence this caused it to lose licensees, thus limiting plaintiff's use of its leased premises. Also, plaintiff presented evidence that the boarded up state of the building dissuaded licensees from entering into licensing agreements at the building, further limiting plaintiff's use. Because plaintiff presented evidence that defendant's actions were specifically directed toward plaintiff's property and had the effect of limiting plaintiff's use of the property, plaintiff presented a question of fact regarding whether an inverse condemnation occurred. The trial court, therefore, erred in granting defendant summary disposition on this issue.

Plaintiff finally argues the trial court erred in holding collateral estoppel and judicial estoppel did not establish, as a matter of law, that defendant took plaintiff's leasehold interest in the property. We disagree.

Whether a party's claim is estopped is an issue of law that this Court reviews de novo. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

The doctrine of collateral estoppel bars subsequent litigation regarding an issue when (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel. *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008); *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 677 NW2d 843 (2004). Mutuality requires that a party invoking collateral estoppel was a party, or in privy to a party, in the prior action and would have been bound by it if it had been adverse. *Monat*, 469 Mich at 684-685.

This doctrine is strictly applied in that "the issues [in both cases] must be identical, and not merely similar . . . ." *Eaton Co Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). The prior litigation must have presented a "full and fair" opportunity for the plaintiff to litigate the issue presented in the subsequent case. *Arim v General Motors Corp*, 206 Mich App 178, 194-195; 520 NW2d 695 (1994). When it applies, collateral estoppel bars relitigation of a question of fact essential to the instant case that was previously litigated and decided by a final and valid judgment. *Monat*, 469 Mich at 682-684.

Collateral estoppel does not bar litigation of whether defendant took plaintiff's leasehold interest because this issue is not identical to the issue litigated in the previous litigation, *Vemulapalli v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 22, 2009 (Docket No. 287566). In the prior litigation, defendant took the landlord's *fee* interest in the property. In this case, the issue is whether defendant also took plaintiff's *leasehold* interest in the property. Because these are distinct interests, the issues presented in these cases are not identical, and collateral estoppel does not apply. *Eaton*, 205 Mich App at 376.

Further, collateral estoppel does not apply because the parties are disputing a question of law rather than a question of fact. *Monat*, 469 Mich at 682-684. Collateral estoppel bars relitigation of issues when prior litigation resolved questions of fact related to the issue and the court resolved the issue based on the facts found. However, collateral estoppel does not bar a party from arguing unrelated legal positions based on the established facts in subsequent

litigation. See *Id*. In the prior litigation, it was established that defendant took the property from the landlord. In this case, defendant does not argue it did not take the property from the landlord. Rather, defendant merely argues the legal effect of that taking is not what plaintiff contends. In essence, defendant does not seek to relitigate the prior issue, it merely argues how the resolution of that issue affects the present case. Collateral estoppel does not, therefore, apply to this issue.

Judicial estoppel, in addition, does not apply to preclude defendant from arguing it did not take plaintiff's leasehold interest. "The doctrine of judicial estoppel is intended to maintain the consistency of court rulings and to keep litigants from playing 'fast and loose' with the legal system." *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). Under the doctrine of judicial estoppel "'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.'" *Id*. at 509 (quoting *Lichon v American Univ Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990)). Michigan applies the "prior success" model of judicial estoppel. *Paschke*, 445 Mich at 509. Under this model, it must appear that the court in the earlier proceeding accepted that party's position as true. *Id*. at 510. Further, for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. *Id*.

In the previous case, the parties did not discuss plaintiff's leasehold interest, and defendant did not argue that it took the leasehold. Defendant's position in the prior lawsuit, where it claimed it took the landlord's interest in the property, is not wholly inconsistent with its position in this suit that plaintiff did not have a leasehold interest that defendant took. Again, defendant has not changed its position from the prior lawsuit, as it readily admits it took the landlord's interest in the property. Defendant merely takes the position that its prior taking of the landlord's interest does not necessarily mean it also took plaintiff's leasehold interest. Because these positions are not wholly inconsistent, judicial estoppel does not apply.

Defendant claims on cross-appeal the trial court erred in holding that plaintiff's damages are not too speculative to support its claims. We disagree.

This Court reviews a trial court's decision to admit evidence of lost profits for an abuse of discretion. *Merkur*, 261 Mich App at 135. "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Whether a plaintiff proved its damages within a reasonable degree of certainty is a question of law this Court reviews de novo. See *Merkur*, 261 Mich App at 135.

Damages are allowed in condemnation cases only if proven within a reasonable degree of certainty. *Merkur*, 261 Mich App at 135. The loss of purely speculative profits is not allowable as an element of compensation. *Id*. However, the court must allow a property owner to present evidence of "'the most profitable and advantageous use it could make of the land'" even if the use was still in the planning stages and had not been executed. *Id*. (quoting *Village of Ecorse v Toledo, CS&D Ry Co*, 213 Mich 445, 447-448; 182 NW 138 (1921)).

"The determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case." *Merkur*, 261 Mich App at 135. In estimating the value of a lease, "it is proper to consider the

location of the premises, their special adaptability to the business there being conducted, the length of time it has been established, its earnings and profits, the unexpired term of the lease, and every other fact that may affect its value. All of these matters go to enhance the value of the lease." *Id*. (citing *In re Park Site on Private Claim 16, City of Detroit*, 247 Mich 1, 4; 225 NW 498 (1929)).

Plaintiff presented sufficient evidence for a trier of fact to determine its damages within a reasonable degree of certainty. Plaintiff provided information regarding its past licensees, including how much they paid to license space on the building and the corresponding labor and installation charges plaintiff received. Plaintiff also presented evidence tending to show it had prospective licensees ready and willing to license the property. Plaintiff's evidence further showed potential licensees may have decided to lease space elsewhere because of defendant's condemnation of the building. If the trier of fact determined that these potential licensees would have in fact licensed space, it could determine plaintiff's lost profits by comparison with plaintiff's past business. Based on past licenses, plaintiff could prove the typical length of these licenses, and the trier of fact could calculate damages based on the length and annual profitability of the licenses. Similarly, if the trier of fact determined that plaintiff lost past licensees because of defendant's actions, it could determine, within a reasonable degree of certainty, the profits plaintiff lost in those deals. Through a comparison of plaintiff's prior business, a trier of fact could determine plaintiff's lost profits within a reasonable degree of certainty.

Defendant attempts to show damages are speculative by proving plaintiff lost its past and potential licensees for reasons unrelated to defendant. However, plaintiff presented evidence tending to show past and future licensees would have entered into licensing agreements with plaintiff. Although defendant also presented evidence the licensees would have chosen other locations regardless of defendant's actions, this merely presents a question of fact regarding whether defendant's actions caused plaintiff's damages. It does not, however, render the calculation of the damages too speculative to determine in this case.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder