STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0204

City of Bloomington, Minnesota, petitioner,
Respondent,

vs.

Orest Associates, et al.,
Defendants,

BP Products North America, Inc.,
Respondent,

William J. Townsend,
Appellant.

Filed December 30, 2008
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-CD-000002724

Marc J. Manderscheid, Brooke C. Swenson, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 (for City of Bloomington, Minnesota)

Gary A. Van Cleve, Michael J. Mergens, Larkin, Hoffman, Daly & Lindgren Ltd., 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, Minnesota 55431 (for BP Products North America, Inc.)

Randy V. Thompson, Nolan, MacGregor, Thompson & Leighton, 710 Lawson Commons, 380 St. Peter Street, St. Paul, Minnesota 55102 (for William J. Townsend)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant William Townsend challenges the district court's order precluding him from seeking loss-of-going-concern value in eminent-domain proceedings arising from the condemnation of property leased to him in connection with a gasoline franchise. Because we conclude that appellant does not have a right to loss-of-going-concern value that survives the termination of his interest in the condemned property, we affirm.

FACTS

In 1997, appellant purchased a gas-station franchise from his father. The franchise was located on the corner of France Avenue South and Old Shakopee Road in Bloomington on a parcel of land known to the parties as "Parcel 13." Respondent BP Products North America, Inc. (BP), owned Parcel 13 in fee simple and was the franchisor of appellant's gas-station franchise.

In January 2003, respondent City of Bloomington (city) adopted a resolution to acquire through eminent domain land for a street-improvement project that included the acquisition of Parcel 13. Upon learning of the city's plans to acquire Parcel 13, appellant began searching for a suitable relocation site for his business. After failing to find a

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

suitable relocation site near Parcel 13, appellant purchased a different gas-station franchise approximately 23 miles from Parcel 13.

On July 1, 2003, the city filed a petition for condemnation and motion for transfer of title and possession. The city, BP, and appellant reached an agreement about the transfer of title, and the district court granted the city's petition. Title to Parcel 13 was transferred to the city on October 30, 2003.

Appellant's new franchise was far less profitable than his BP franchise, and, during the summer of 2005, appellant and the city exchanged several communications regarding appellant's entitlement to damages for the loss-of-going-concern value of his BP franchise. It was the city's position that appellant had no claim for loss-of-going-concern damages. On May 2, 2007, appellant moved the district court to determine whether the city's taking of Parcel 13 constituted a taking or destruction of the going-concern value of his BP franchise and to direct the commissioner appointed to oversee negotiations between BP and the city to hear evidence of appellant's loss-of-going-concern value.

The district court found that appellant did not meet the requirements necessary to establish a claim for loss-of-going-concern value pursuant to *City of Minneapolis v. Schutt*, 256 N.W.2d 260, 265 (Minn. 1977). The district court also found that under *Hous. & Redev. Auth. of St. Paul v. Lambrecht*, 663 N.W.2d 541, 546 (Minn. 2003), appellant was barred from receiving loss-of-going-concern damages because the condemnation clause in appellant's contract with BP terminated appellant's interest in Parcel 13 upon the city's taking of Parcel 13.

Appellant argued that the standard landlord/tenant analysis in *Lambrecht* is not applicable, asserting that subchapter I of the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801–2806 (2006) (PMPA) creates an "evergreen franchise relationship" that gives him a greater interest in loss-of-going-concern value than a mere tenant. The district court rejected appellant's argument, finding that "any remedy sought . . . under the PMPA must be brought against the franchisor, not the government entity exercising eminent domain." Accordingly, the district court denied appellant's motion to present evidence to the commissioner regarding his loss-of-going-concern value. This appeal follows.

D E C I S I O N

In *Lambrecht*, the supreme court held that "[w]hen the lease contains a clause that automatically terminates [the lease] upon condemnation of the land, the lessee is entitled to no compensation for the loss of his leasehold interest, since he agreed in advance to such a termination." 663 N.W.2d at 546 (second alteration in original) (quotation omitted). This result was compelled by "the general rule that if a tenant agrees to a lease clause that automatically terminates a lease at the time of condemnation, 'the tenant has no right which persists beyond the taking and can be entitled to nothing.'" *Id*. at 547 (quoting *Korengold v. City of Minneapolis*, 254 Minn. 358, 363, 95 N.W.2d 112, 115 (1959)) (other quotation omitted).

Here, the franchise contract between appellant and BP contains a condemnation clause which provides that

> [BP] has the right at any time to terminate or nonrenew this Agreement . . . for any reason or ground permitted by the PMPA or other applicable federal, state or local law. . . . [BP] has such right of termination or nonrenewal upon . . . [c]ondemnation or other taking, in whole or in part, of the Facility pursuant to the power of eminent domain or a conveyance in lieu thereof.

The contract further provided that "[u]nless otherwise provided by law, [BP] is entitled to the full amount or proceeds for condemnation or other taking of the premises, in whole or in part, pursuant to the power of eminent domain or pursuant to a conveyance in lieu of condemnation."

Relying on *Lambrecht*, the district court concluded that the condemnation clause in appellant's contract with BP barred appellant from receiving loss-of-going-concern damages because "[f]ollowing the termination of the lease, [appellant] was no longer a tenant of BP, and no longer had any property interest in Parcel 13." Appellant argues that the PMPA renders *Lambrecht* inapplicable and gives him a protected right to loss-of-going-concern value that survives termination of his interest in Parcel 13 and cannot be waived. Whether the PMPA grants appellant such a right is a matter of statutory construction. Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

"Congress enacted the PMPA after investigating and considering numerous allegations that petroleum franchisors used threats of termination or nonrenewal of the franchise to compel franchisees to comply with their marketing policies." *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984). "There were also numerous complaints before Congress of unfair terminations and nonrenewals for arbitrary and

discriminatory reasons." *Id.* "Congress intended the PMPA to address this disparity in bargaining power." *Id.* (citation omitted).

Subchapter I of the PMPA provides, in part:

> Except as provided in subsection (b) of this section and section 2803 of this title, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—
>
> (1) terminate any franchise . . . prior to the conclusion of the term, or the expiration date, stated in the franchise; or
>
> (2) fail to renew any franchise relationship. . . .

15 U.S.C. § 2802(a). Subsection (b) of section 2802 states that a franchisor may terminate a franchise upon "[t]he occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable," which includes "condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain." 15 U.S.C. § 2802(b)(2)(C), (c)(5).

The PMPA further provides that

> if such termination or nonrenewal is based upon an event described in subsection (c)(5) of this section, the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will.

15 U.S.C. § 2802(d)(1). "If a franchisor fails to comply with the requirements of [the PMPA], the franchisee may maintain a civil action against such franchisor." 15 U.S.C. § 2805(a).

Appellant first contends that under the PMPA, "take it or leave it" contracts are valid, and that his contract with BP was a "take it or leave it" contract. According to appellant, he thus had no ability to negotiate the contract's terms and therefore did not "agree" to the condemnation clause. Appellant asserts that since he did not "agree" to the condemnation clause, *Lambrecht* does not apply. We disagree. Appellant's contract with BP explicitly stated that appellant agreed to the terms of the contract. Further, *Lambrecht's* applicability does not turn on the distinction appellant attempts to draw between agreeing to the terms of a contract and having the ability to negotiate a specific term in the contract. There is no indication that the lessee in *Lambrecht* negotiated the condemnation clause in his contract, yet the supreme court found that the lessee agreed to the condemnation clause.

Next, appellant suggests that a right to an apportionment of loss-of-going-concern value under section 2802(d)(1) only arises upon condemnation. He therefore argues that any analysis which terminates his interest in loss-of-going-concern value upon condemnation, as the *Lambrecht* analysis does, is inapplicable. Appellant also claims that his interest in loss-of-going-concern value is unwaivable under section 2805(f)(1), such that the condemnation clause in his contract with BP does not and cannot waive his right to loss-of-going-concern value.

"Basic canons of statutory construction instruct that we are to construe words and phrases according to their plain and ordinary meaning." *Am. Fam. Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The interpretation of federal statutes is governed by the same instruction. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (stating

that courts "must give words their ordinary or natural meaning" when interpreting a statute) (quotation omitted). Here, the plain language of section 2802(d)(1) states that a franchisee is only entitled to an apportionment of any compensation the *franchisor* receives for loss-of-going-concern, *if* any such compensation is received.

Accordingly, if BP had received compensation for loss-of-going-concern value, appellant would have an unwaivable right to an apportionment of that compensation, and appellant's right would survive condemnation and the termination of his interest in Parcel 13, notwithstanding *Lambrecht*. But because BP has not received any compensation for loss-of-going-concern value, appellant has no right to loss-of-going-concern value that survives termination of his interest in Parcel 13.

Appellant further asserts that even if *Lambrecht* applies, he is entitled to loss-of-going-concern value. The *Lambrecht* court stated that "[h]ad [the lessee] intended to retain some rights in the property after condemnation, it could have retained those rights through the lease agreement." 663 N.W.2d at 547. Here, appellant claims that he retained a right to loss-of-going-concern value through section 2802(d)(1) of the PMPA. He directs this court to paragraph 25 of his contract with BP, which states, "*[u]nless otherwise provided by law*, [BP] is entitled to the full amount of proceeds for condemnation or other taking of the premises, in whole or in part, pursuant to the power of eminent domain or pursuant to a conveyance in lieu of condemnation." (Emphasis added.) Appellant argues that section 2802(d)(1) of the PMPA is the "otherwise provided by law" through which he retains a right to loss-of-going-concern value.

But again, the plain language of section 2802(d)(1) suggests that the only right to loss-of-going-concern value that the PMPA grants appellant is a right to an apportionment of any loss-of-going-concern compensation BP receives. Because BP did not receive any compensation for loss-of-going-concern value, appellant retains no right to loss-of-going-concern value under the PMPA.[1]

Appellant maintains that a plain reading of section 2802(d)(1) places him at the mercy of BP, which, according to appellant, has no incentive to seek loss-of-going-concern value. Appellant suggests that BP may even have reason to characterize any amount it receives for loss-of-going-concern value as something other than loss-of-going-concern value in order to avoid the PMPA's apportionment provision. Appellant urges this court to inform its reading of section 2802(d)(1) with the legislative history of the PMPA, which appellant contends supports his position.

Although appellant raises valid concerns, neither he nor respondent argues that the language of section 2802(d)(1) is ambiguous, and we will consider legislative history only when a statute's language is ambiguous. *See Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004) (stating that further construction of a statute is neither necessary nor permitted if the words of the statute are unambiguous). Additionally, if appellant believes that BP has violated section 2802(d)(1) of the PMPA by failing to apportion an

[1] Appellant also argues that this court can consider his claim for loss-of-going-concern value under Minn. Stat. § 117.186 (2006), which requires the payment of loss-of-going-concern awards unless the condemning authority can satisfy certain statutory criteria. But the eminent-domain action in this case began on July 1, 2003, and as appellant admits, section 117.186 applies only to eminent-domain actions commenced after May 20, 2006. 2006 Minn. Laws ch. 214, § 22, at 205–06.

award it received for loss-of-going-concern value, he can pursue a fair apportionment by bringing a civil action against BP directly under the PMPA. 15 U.S.C. § 2805(a).

The PMPA does not provide appellant with a right to loss-of-going-concern value that survives the taking of Parcel 13. As a result, appellant has no compensable interest in Parcel 13 and is not entitled to present evidence to the commissioner regarding his loss-of-going-concern value. We therefore need not consider appellant's claim that he meets the requirements necessary to establish a claim for loss-of-going-concern value under *Schutt*. We also do not consider appellant's assertion that BP has a good-faith obligation to seek loss-of-going-concern value because this issue was not presented to or considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (limiting appellate review to issues presented to and considered by district court).

Affirmed.