2012 IL App (3d) 100472-U

Order filed June 18, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

ZAUSA DEVELOPMENT CORPORATION,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois
	)	
v.	)	Appeal No. 3-10-0472
	)	Circuit No. 07-ED-54
	)	
BRIAN I. ROSS and TAMRA JETTER,	)	Honorable
	)	Gerald R. Kinney,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Carter concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal regarding a developer's entitlement to final just compensation following a quick-take proceeding under the Eminent Domain Act remanded to circuit court for clarification of its final just compensation order.

¶ 2 Plaintiff Zausa Development Corporation (Zausa) filed this appeal from the circuit court's final judgment order which, according to Zausa, denied Zausa's request to withdraw a portion of a preliminary just compensation award following a quick-take proceeding under the Eminent Domain Act (the Act). 735 ILCS 30/20-5-5 *et seq.* (West 2006). Defendants Brian Ross and

Tamra Jetter (Ross and Jetter) opposed Zausa's petition to withdraw in the proceedings below. They have not filed a brief in this appeal. After reviewing Zausa's arguments on appeal and the record, we remand this matter to the circuit court for clarification.

¶ 3 FACTS

¶ 4 On August 7, 2007, Zausa entered into a real estate sales contract with Brian Ross and Tamra Jetter for the sale of certain property in Plainfield, Illinois. The contract included an agreed legal description of the property to be transferred from Zausa to Ross and Jetter which was signed by all parties. According to that legal description, Zausa agreed to sell and Ross and Jetter agreed to buy "Lot 156 in Homesteads at Caton Crossing Unit 3" ("Lot 56"), except for a portion of Lot 156 which was described in a separate paragraph and labeled a “Proposed R.O.W. Acquisition." However, the warranty deed recorded on December 7, 2007, omitted the word "except" between the two paragraphs describing the property. Thus, by its terms, the warranty deed purports to convey all of Lot 156 from Zausa to Ross and Jetter, contrary to the terms of the real estate contract.

¶ 5 On December 5, 2007, the Illinois Department of Transportation (IDOT) filed a complaint for condemnation seeking fee simple title to real property in Plainfield, Illinois, designated as "Parcel 1FP0077" and temporary construction easements to two other parcels. IDOT attached to its complaint a legal description of Parcel 1FP0077. That legal description matched the legal description of the "Proposed R.O.W. Acquisition" in the parties' real estate contract.

¶ 6 On March 24, 2008, IDOT filed a motion for immediate vesting of title and for possession and use of property pursuant to the quick-take procedure of section 20-5-5 of the Act.

735 ILCS 30/20-5-5 (West 2006). Pursuant to an agreement with Tamra Jetter, the circuit court subsequently ordered IDOT to deposit $25,600 with the Treasurer of Will County as preliminary just compensation for the taking of the three parcels. On June 3, 2008, that amount was deposited with the county treasurer. On June 19, 2008, IDOT moved for entry of an order vesting fee simple title to parcel 1FP0077 and temporary construction easements to the other parcels, which was granted on June 26, 2008.

¶ 7 On the day that title was vested in IDOT, Zausa petitioned to withdraw a portion of the preliminary just compensation award. Zausa claimed that it owned Parcel 1FP0077 on the date that the condemnation petition was filed and claimed that it was therefore entitled to $13,300 of the preliminary just compensation for IDOT's taking of that parcel.[1] Zausa claimed that, while it had conveyed a portion of Lot 156 to Ross and Jetter in the August 7, 2007, real estate contract, it had not conveyed Parcel 1FP0077. Zausa noted that the contract had specifically excepted the property described as Parcel IFP0077 from the property that Zausa had sold to Ross and Jetter. Zausa claimed that the failure to include the word "except" in the property description in the deed was a mutual mistake of the parties.

¶ 8 Ross and Jetter filed a response to Zausa's petition on August 15, 2008. Ross and Jetter acknowledged that they entered into the August 7, 2007, contract with Zausa. However, Ross and Jetter argued that Zausa was not entitled to withdraw any portion of the preliminary just

[1] Zausa claimed that Ross and Jetter owned the temporary construction easements taken by IDOT. The $13,300 sought by Zausa was the value of the total just compensation amount ($25,600) less $6,300 for the construction easements and $6,000 for certain unspecified "damages to the property."

compensation. Ross and Jetter maintained that, because the deed conveying the property to them did not except Parcel IFP0077, Zausa's assertion of an interest in that parcel was barred by the doctrine of merger by deed. They also argued that the court should not consider Zausa's claim of mutual mistake because Zausa had not instituted any action against Ross and Jetter and there had been no determination that a mutual mistake existed. Accordingly, Ross and Jetter maintained that Zausa's petition was an improper attempt to reform the recorded deed. Moreover, Ross and Jetter contended that Zausa's claim of mutual mistake must fail because any alleged mistake in the real estate contract was due to Zausa's lack of due care when drafting the deed. Ross and Jetter petitioned to withdraw the entire $26,500 of the preliminary just compensation.

¶ 9 On October 1, 2008, the circuit court issued a written order granting Ross and Jetter's petition and denying Zausa's petition. In its order, the circuit court held that "the titled holder at the time of the taking, Defendants Jetter and Ross, are entitled to withdraw the preliminary just compensation award." Zausa sought interlocutory review of the circuit court's order. On June 15, 2009, we held that Zausa's petition for interlocutory review was premature and dismissed Zausa's petitioned for lack of jurisdiction.

¶ 10 On June 2, 2010, the circuit court entered a final judgment order confirming the vesting in IDOT of fee simple title to Parcel 1FP0077 and the temporary construction easements. In its final judgment order, the circuit court identified the "owners and interested party in Parcel No. 1FP0077" and the temporary easements as "Brian L. Ross, Tamra Jetter, and Zausa Development Corporation." The court further ruled that these three parties were "entitled to receive the sum of $25,600 as full compensation for title to the said parcels ($13, 300.00 for temporary easements;

$6,300.00 for the fee taking; and $6,000.00 for damages to the remainder)." The trial court entered judgment for Ross and Jetter and Zausa in the amount of $25,600.

¶ 11 Zausa now appeals the circuit court's October 1, 2008, order again, claiming that the October 1, 2008, order was "made final" by the circuit court's June 2, 2010, final judgment order. Zausa challenges the circuit court's determination in the October 1, 2008, order that "Jetter and Ross were entitled to the entire preliminary just compensation award." Zausa argues that it is entitled to collect the entire award because the real estate contract shows that there was a mutual mistake in the deed and that the parties never intended Zausa to convey Parcel 1FP0077 to Ross and Jetter. Zausa's appellant's brief does not acknowledge that the circuit court's June 2, 2010, final judgment order ruled that Zausa was an "interested party" that was entitled to share in some portion of the final just compensation award.

¶ 12 The circuit court's final judgment order did not specify how much of the final just compensation award Zausa was entitled to withdraw. Nor did it explain the basis of Zausa's interest in the property. Moreover, the circuit court did not explain how it calculated the values of Parcel 1FP0077 and the two temporary construction easements, and the court's determination of those values appears to be at odds with the amounts that Zausa provided in its petition to withdraw a portion of the preliminary just compensation award. This court was unable to decide Zausa's appeal without this critical information. Accordingly, on October 12, 2011, we entered an order remanding the matter to the circuit court and directing the court to clarify its final judgment order. Specifically, we directed the circuit court to clarify: (1) why it concluded that Zausa is an "interested party" that is entitled to receive a portion of the just compensation award; (2) the nature of Zausa's interest; (3) how much of the just compensation award Zausa is entitled

to receive; and (4) the values of each of the parcels at issue and how the court calculated those values.

¶ 13 On November 8, 2011, the circuit court posted a response to our order on its docket which stated that the court had "no recollection" and was "unable to supplement the 6-2-10 record when the motion was granted."[2]

¶ 14 ANALYSIS

¶ 15 In this appeal, Zausa argues that it is entitled to withdraw the entire just compensation award and that the circuit court erred in awarding the entire award to Ross and Jetter. Zausa asserts that it is appealing the circuit court's October 1, 2008, preliminary just compensation which, it claims, was "made final" by the circuit court's June 2, 2010, final judgment order. However, contrary to Zausa's argument, the circuit court's final judgment order does not reiterate or confirm the preliminary order's finding that Zausa is not entitled to recover any portion of the just compensation award. To the contrary, the final order provides that Zausa is an "interested party" that is entitled to receive some portion of the award. However, the final judgment order does not specify the basis of Zausa's interest or what portion of the award Zausa is entitled to recover.

¶ 16 Before we can rule on Zausa's claims of error in this appeal, we must know what the circuit court ruled. Specifically, we must know what portion of the final just compensation award that Zausa is entitled to recover under the circuit court's final judgment order and why the court ruled that Zausa was entitled to recover that amount (*i.e.*, the basis of Zausa's interest in the

[2] The trial court also noted that "the Defendant was not present when the summary judgment was granted."

property). Did the court find that Zausa had an equitable interest in the property because there was a mutual mistake in the deed?[3] If so, why did the court apparently find that Zausa was entitled to recover only a portion of the just compensation award for Parcel 1FP0077, rather than the entire amount? The circuit court's final order provides no answers to these questions. Nor does the circuit court's response to our clarification order. We will not attempt to infer answers to these dispositive questions by implication. Accordingly, we must remand for clarification. See, *e.g.*, *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 660 (2009); *People v. Clifton*, 342 Ill. App. 3d 696, 715 (2003).

¶ 17 On remand, the circuit court shall hold a hearing to determine: (1) whether Zausa is an "interested party" that is entitled to receive a portion of the final just compensation award; (2) if so, the nature of Zausa's interest in the property at issue and in the final just compensation award; (3) how much of the just compensation award Zausa is entitled to receive; and (4) the values of each of the parcels at issue, including Parcel 1FP0077 and the two temporary construction

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[3] A mutual mistake in a deed may create an equitable interest in the property that was mistakenly conveyed. See Restatement of Restitution § 160, Comment k, at 649-50 (1937) (where a person through mistake transfers to another more land than intended, the transferor is entitled to reformation and transferee holds title to land upon a constructive trust for the transferor); Restatement of Restitution § 163, Comment d, illustration 3, at 665 (1937) ("A, the owner of Blackacre and Whiteacre, agrees to convey Blackacre to B for $10,000. By a mistake in the description in the deed, A transfers Blackacre and Whiteacre to B. B holds Whiteacre upon a constructive trust for A and can be compelled to reconvey it to A."); see also Restatement of Restitution § 203, Comment b, at 830-31 (1937) (following property).

easements. In determining the nature and extent of Zausa's interest, the circuit court should consider whether Zausa needs to demonstrate that there was a mutual mistake in the deed in order to demonstrate an interest in the just compensation award and, if so, whether Zausa needs to present evidence of a mutual mistake sufficient to justify a reformation of the deed. The circuit court should also demonstrate how it calculates the values of the parcels at issue, including Parcel 1FP0077 and the two temporary construction easements.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, we remand this matter to the circuit court of Will County so that it may hold a hearing and make findings on the issues described above.

¶ 20 Cause remanded.