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DISTRICT II

August 9, 2023

To:

Hon. Chad G. Kerkman
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Clayton Patrick Kawski
Electronic Notice

Benjamin Southwick
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1356 K & D Realty, LLC v. Wisconsin Department of Transportation (L.C. #2020CV858)

Before Neubauer, Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

K & D Realty, LLC (K & D) appeals an order dismissing its claim to recover future rent that it asserts was lost after the Wisconsin Department of Transportation (DOT) acquired two of its commercial properties by eminent domain. The circuit court granted summary judgment in favor of the DOT on this issue. Based upon our review of the briefs and Record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

K & D owned two properties that it leased to commercial tenants who operated a Toppers Pizza and a Jiffy Lube service center, respectively. As relevant to this appeal, K & D negotiated eminent domain/condemnation clauses with both of its tenants in their respective leases. K & D's lease with J & R Ventures, who operated Toppers Pizza, stated, in relevant part:

> XIV. EMINENT DOMAIN
>
> In the event that more than one-fourth (1/4) of the Leased Premises shall be condemned or taken by eminent domain by any public authority, or sold to any public authority in lieu of such condemnation, this Lease shall terminate as of the date possession is taken or sold and Tenant shall surrender possession of the Leased Premises … The entire condemnation award or proceeds of sale shall belong to and be the property of Landlord and Tenant shall have no claim for loss of its leasehold estate; provided, however, if Landlord's award is not affected thereby, Tenant shall be entitled to any separate award made for the cost of relocating Tenant.

In K & D's lease with Jiffy Lube International Inc., K & D negotiated and agreed to a condemnation clause under which, if the leased premises were acquired in whole or in part by condemnation, either (1) the tenant could terminate the lease, or (2) if the lease was not terminated, the annual rent payable would be reduced by a fraction that, in the case of a total taking of the leased premises, equates to a 100% rent reduction:

> If Tenant shall have no right to terminate or if Tenant shall not exercise any option to terminate this Lease or to purchase the Demised Premises, then and in either such event, this Lease shall continue in effect with respect to the portion of the Demised Premises not so taken, except that the annual rent payable shall be reduced by a fraction, the numerator of which shall be the number of square feet or condemned, and the denominator of which shall be the square footage of the Demised Premises prior to the taking or condemnation.

On August 17, 2018, DOT acquired the Toppers Pizza and Jiffy Lube properties in full for a public highway improvement project pursuant to its eminent domain authority. K & D's tenants thereafter ceased making rent payments to K & D.

K & D stipulated that it received "just compensation" from the DOT for the two properties.[2] *See* WIS. CONST. art. I, § 13. However, K & D filed a lawsuit claiming, in part, that in addition to just compensation, it was also entitled to post-acquisition rental losses under WIS. STAT. § 32.195(6). Section 32.195 provides, in relevant part:

> In addition to amounts otherwise authorized by this subchapter [eminent domain], the condemnor shall reimburse the owner of real property acquired for a project for all reasonable and necessary expenses incurred for:
>
> ….
>
> (6) Reasonable net rental losses when all of the following are true:
>
> (a) The losses are directly attributable to the public improvement project.
>
> (b) The losses are shown to exceed the normal rental or vacancy experience for similar properties in the area.

Id.

The DOT responded that WIS. STAT. § 32.195(6) did not permit recovery of post-acquisition rental losses and that, pursuant to the statute, recovery was limited to pre-acquisition rental losses. Alternatively, the DOT argued that K & D's claimed post-acquisition rental losses

[2] K & D advises this court that the DOT issued an award of damages to acquire each parcel. The award of damages was $1,800,000 for the parcel containing Toppers and $820,000 for the parcel containing Jiffy Lube. K & D states it appealed the amount of compensation stated in each award and that both cases were settled in mediation.

were not directly attributable to DOT's highway project. Instead, the DOT asserted K & D's claimed rental losses were directly attributable to the eminent domain/condemnation provisions in K & D's own negotiated leases, which were triggered when the DOT acquired the property.

K & D moved for partial summary judgment, asking the court to conclude its post-acquisition rent losses were directly attributable to the highway project and not the eminent domain/condemnation provisions contained in its private leases. The DOT responded and argued, in part, K & D's claimed losses were not directly attributable to the project because, in its private leases, K & D agreed to no further rent payments upon a total transfer of property ownership by eminent domain or condemnation. The DOT asserted the circuit court should instead grant partial summary judgment in its favor. The circuit court granted the DOT's motion, concluding K & D was not entitled to post-acquisition rental losses. K & D appeals.

On appeal, K & D argues the circuit court erred by determining it was not entitled to post-acquisition rental losses.[3] The DOT responds the circuit court's order was proper because, given K & D's private leases, K & D's claimed rental losses were not directly attributable to the DOT's highway project. Alternatively, the DOT argues that WIS. STAT. § 32.195(6) does not allow for the recovery of post-acquisition rental losses.

[3] There are a few instances in K & D's brief where it asserts the circuit court determined it was not entitled to pre- and post-acquisition rental losses. The circuit court's order, however, is silent as to pre-acquisition rental losses and relates only to post-acquisition rental losses—"Plaintiff is not entitled as a matter of law to payment *of its post-acquisition rental loss claims*." (Emphasis added). After the court made this determination, K & D and the DOT stipulated to a dismissal of K & D's remaining claims so that K & D could appeal. The DOT explains in its brief that this appeal is limited to post-acquisition rental losses. We limit our analysis to the order K & D seeks to have this court review, which only involves post-acquisition rental losses.

We conclude the circuit court's partial grant of summary judgment in favor of the DOT was proper. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶42, 330 Wis. 2d 389, 793 N.W.2d 860 ("Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law."). K & D's rental losses were caused by the fact that it had negotiated provisions in the leases with its tenants that provided if the property were acquired by eminent domain or condemnation that the lease would either terminate entirely (as in the case of Toppers) or the future rent amount would be set at zero (as in the case of Jiffy Lube). K & D contractually gave up its right to future rent if the properties were acquired by eminent domain or condemned.

In ***Rotter v. Milwaukee Cnty. Expressway & Transp. Comm'n***, 72 Wis. 2d 553, 556, 241 N.W.2d 440 (1976), the owner voluntarily released its tenant from its rental obligations under its lease six months before the rented building was taken by Milwaukee County. The owner's claim for rental loss was denied because:

> Any rent loss sustained by the [owner] under their lease with [their tenant] was, as the trial court found, solely attributable to the [owner] having released [the tenant] from its obligation to pay rent under the written agreement. Such being the situation, the rent loss sustained was not caused by the acquisition of the store building by the county, but by the release of rental obligations agreed to by the [owner].

Id. at 557-58.

Here, similarly, K & D was under no obligation to include these eminent domain/condemnation provisions in its private rental agreements. However, by doing so, K & D released its tenants from their obligations to pay rent in the event of a taking. Similar to the situation in ***Rotter***, "the rent loss sustained was not caused by the acquisition of the store

building by [the DOT], but by the release of rental obligations agreed to by [K & D]." *See* ***id.*** The DOT's highway project was not directly attributable to K & D's future rent loss. Accordingly, K & D is unable to recover reasonable net rental losses under WIS. STAT. § 32.195(6).[4]

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[4] We need not reach the DOT's alternative argument that WIS. STAT. § 32.195(6) does not allow for the recovery of post-acquisition rental losses. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground[.]").