NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4495-11T3

CITY OF LONG BRANCH,

Plaintiff-Respondent,

v.

WEST OF PIER ASSOCIATES, LLC; CARMEN V. CICALESE, JR.; ANTHONY M. CICALESE; JENNIFER E. CICALESE; PATRICK CICALESE; and JAC CORPORATION,

Defendants-Appellants,

and

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for the First National Bank of Toms River, New Jersey; REPUBLIC CREDIT CORPORATION; SMALL BUSINESS ADMINISTRATION; and AMERICAN BANKERS LIFE,

Defendants.

Argued January 29, 2014 – Decided February 13, 2014

Before Judges Fuentes, Fasciale and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1080-01.

R.S. Gasiorowski argued the cause for appellants (Gasiorowski & Holobinko, attorneys; Mr. Gasiorowski, on the briefs).

Paul V. Fernicola argued the cause for respondent.

PER CURIAM

This case returns following a remand to the Law Division. We affirm.

We incorporate by reference rather than reciting at length the facts and procedural history of this case contained in our prior opinion. City of Long Branch v. West of Pier Assocs., LLC, No. A-1292-08 (App. Div. August 5, 2010) (slip op. at 3-7). We recite only the salient facts.

This is a real property condemnation action. On March 7, 2001, plaintiff City of Long Branch (the City) instituted a condemnation action seeking to acquire property located at 74 Ocean Avenue. Id. at 2. Defendant West of Pier Associates, LLC, owned the property, and defendants, Carmen V. Cicalese, Jr.; Anthony M. Cicalese; Jennifer E. Cicalese; Patrick Cicalese; and JAC Corporation (collectively referred to as defendants) held secured interests in the property. Ibid. On May 3, 2001, the City filed a declaration of taking and deposited $1,184,000 into court. Id. at 3.

The parties thereafter agreed to submit the issue of compensation for the property to binding arbitration before a panel of three arbitrators. Ibid. On December 14, 2007, the arbitrators set the fair market value of the property as of May

2001, at $3,940,000 and, in January 2008, the City's designated developer paid defendants the difference between the amount of the award and the City's initial deposit. Id. at 3-4. Defendants then filed a motion seeking to confirm the arbitration award and to schedule a hearing to determine the amount of interest the City owed on the award. Id. at 4.

The parties submitted competing expert reports addressing the question of interest to the court. Id. at 4-6. Defendants filed a motion seeking to bar a certification submitted by the City's expert, Hugh McGuire. Id. at 5. "On September 26, 2008, without addressing the motion seeking to bar McGuire's certification, the court denied defendants' request for an evidentiary hearing, and determined that interest was to be calculated in accordance with Rule 4:42-11. On September 30, 2008, the court entered a confirming order." Id. at 6. Defendants appealed. Ibid.

In our opinion, we determined "that the trial court should have conducted an evidentiary hearing in determining the appropriate rate of interest." Id. at 7. We therefore remanded to the trial court to conduct an evidentiary hearing. Id. at 13. In addition, we held that "[i]f the City again offer[ed] McGuire as its interest rate expert, the court should conduct an

N.J.R.E. 104(a) hearing as to his qualifications to testify on the subject." Ibid.

On remand, Judge Dennis O'Brien conducted the N.J.R.E. 104(a) hearing to determine McGuire's qualifications to testify as an expert. McGuire testified that he had been licensed in New Jersey as a real estate appraiser since 1960. He was also a State-certified general appraiser, a member of various real estate appraisal groups, and a certified tax assessor. Although he had never provided an expert opinion in court on an interest issue, McGuire testified that he had previously been qualified as an expert in the evaluation of real property by State courts, federal district courts, the United States Bankruptcy Court, and the New Jersey Tax Court. McGuire described three approaches to valuing real property: cost approach, comparable sales approach, and income capitalization approach. McGuire explained that, as part of the income capitalization approach, real estate appraisers consider interest rates and rates of returns on alternate investments. He noted that his experience in deriving a property's residual value helped him in choosing an appropriate interest rate for the property involved in this case.

At the conclusion of the hearing, Judge O'Brien found that McGuire was qualified to testify as an expert on the appropriate

rate of interest to be paid to defendants by the City. Regarding McGuire's qualifications, the judge observed:

> [W]hat I have is somebody who has been working in the field of real estate since 1960 which is slightly less than the length of time I've been alive.
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> And he testified at length about the three approaches that are used by appraisers in coming to various figures, appraisals for properties and land; the cost, comparable sales and income capitalization. And he gave some testimony as to how those work.
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> . . . I note that he's been qualified to testify as a real estate expert before the Superior Courts, the Federal Courts, Bankruptcy Court, apparently the Tax Court as well. Has taken all sorts of courses at Rutgers and at real estate schools.
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> This doesn't say anything about his educational background, but it notes that he is a licensed real estate broker in the State of New Jersey and that he is a state certified general appraiser and a member of various real estate appraisal type groups and a certified tax assessor for the State of New Jersey.
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> . . . .
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> As far as I'm concerned, Mr. McGuire has extensive qualifications in the real estate field. And the appraisal of real estate is obviously not an exact science by any stretch. The fact that there are three different methodologies that are generally used is one thing. And you've got to look at various types of properties . . . you're not always comparing the proverbial apples to apples.

> And to try to figure out what is an appropriate rate of interest to ultimately give to the defendant as further just compensation other than the value of the land, I'm satisfied that he is qualified to testify about the methodologies he used.

The matter was thereafter transferred to Judge Linda Grasso Jones, who conducted a four-day trial on the interest issue. The City's position was that interest should be calculated pursuant to Rule 4:42-11. In addition to the testimony of McGuire, the City relied upon expert testimony provided by Dr. Robert Powell. Dr. Powell held a Ph.D. from Princeton University's Woodrow Wilson School of Public and International Affairs and was a licensed real estate broker in New Jersey. He had also served as the executive director of the New Jersey Economic Development Authority and, after leaving that position, held management positions with several real estate development companies. Over defendants' objection, the judge permitted Dr. Powell to provide his expert opinion on the appropriate interest rate to be paid by the City in this case.

Dr. Powell opined that the Rule rate should be used to calculate the interest. He testified that interest rates were "relatively stable" between 2001, when the property was taken, and 2008, when the City paid defendants the compensation due to them. Dr. Powell explained that the Rule rate is established by the Legislature "based upon the yield of the New Jersey Cash

Management Fund, a professionally-managed fund that contains relatively secure investments" such as securities issued by the United States and commercial bank certificates of deposit. Dr. Powell also stated that the Rule rate adds 2% to the New Jersey Cash Management Fund yield.

According to Dr. Powell, it was important to balance a reasonable rate of return with maintaining the safety of the principal. Because the party paying the interest in this case was a municipality, there was little doubt that defendants would be paid whatever amount was determined by the court. Therefore, Dr. Powell opined that the Rule rate, which applies to safe, secure transactions such as the one involved in this case, was the appropriate rate to use.

Dr. Powell's conclusions were echoed by McGuire, who also compared the Rule rate to the prime rate of interest. McGuire testified that the Rule rate was actually higher than the prime rate in 2001, 2002, 2003 and 2008. However, Judge Grasso Jones found that McGuire's calculations were not entirely persuasive because the rates for 2001 and 2008 were "comparably high compared to the six-year period that ran from 2002 through 2007."

Defendants' position at the hearing was that the prime rate of interest should be used to determine the interest due to them

and that an additional "risk premium" should be added to that rate. In support of this position, defendants relied upon two expert witnesses. J. Michael Feeks was the managing director of a software provider and held an undergraduate degree in economics and graduate degrees in corporate financing and banking. Feeks's theory was that defendant "West of Pier served as 'banker' to the" entity that was going to develop the property after obtaining it from the City. According to Feeks, if that entity had paid the fair market value for the property determined by the arbitrators, $3,940,000, in 2001 when the City initially paid $1,184,000 into court, the entity "would have needed to raise an additional $2,756,00[] to fund the project." Feeks believed that, in order to determine the appropriate interest rate on this sum, the court should consider "what interest rate a bank would have charged" the entity for a $2,756,000 loan. Feeks testified that the prime rate was routinely used for similar commercial loans in New Jersey and, because these loans contain elements of risk, it was also appropriate to add a 2.25% risk premium to the prime rate to fully compensate defendants. However, Feeks conceded that the present case involved an "unconditional guarantee by a municipal government agency" to pay the interest and that this "would

reduce the risk of default" and, therefore, reduce the appropriate rate of interest.

Feeks's opinion was shared by Kristin Kucsma, who also testified as an expert on behalf of defendants. Kucsma was an economist and held undergraduate and graduate degrees in economics. She believed that the prime rate should be used to calculate the interest due to defendants and that a risk premium of between 1% and 2.9% should be added. In an earlier report, however, Kucsma had rejected the use of the prime rate of interest and, instead, stated that "the ten year treasury rate that was in effect on May 1st, 2001 plus mark up" was more appropriate.

On March 30, 2012, Judge Grasso Jones rendered a comprehensive thirty-five page written opinion. In an order issued on that date, she awarded defendants "interest on the portions of just compensation paid by [the City] in January 2008 at the interest rate established under New Jersey Court Rule 4:42-11 . . . ." In her decision, Judge Grasso Jones thoroughly considered all of the expert testimony presented at the four-day trial, including the documentary evidence and reports produced by the parties. The judge concluded that the flaw in the testimony provided by Feeks and Kucsma was that they focused on the entity that was going to develop the property, rather than

the City, as "borrower." She explained that "[t]he present matter, however, does not involve a commercial loan but a condemnation action by the City, a public entity." Once the City obtained the property through condemnation, it, rather than the developer, was responsible for paying defendants for the property at its fair market value. Thus, the judge found that the risk of default that typically exists with a commercial loan was not present in this case. Accordingly, defendants failed to establish a basis for seeking an enhanced rate of interest comprised of the prime rate, plus a risk premium.

The judge further found that Feeks's opinion was unreliable because he based it upon a hypothetical situation where a private developer obtained a commercial loan, a situation that did not exist here. Feeks also conceded that "the repayment certainty provided by the city as guarantor substantially reduces the interest rate that would be charged for the hypothetical loan . . . ." The judge also found that Kucsma's testimony was not credible, because she changed her opinion without "provid[ing] any basis for the turnaround . . . other than her reliance on the opinion of Mr. Feeks, which had been provided after her report had been issued."

Thus, the judge found that:

> The record lacks any support for the proposition that the [p]rime [r]ate is the

> appropriate benchmark or standard here. Mr. Feeks testified that the [p]rime [r]ate is the basis by which a commercial bank determines the interest rate paid by a private-entity developer. But that is not the situation in the present matter.

She further observed that,

> [e]ven if interest were to be awarded based upon a U.S. Treasury or [p]rime [r]ate plus some risk premium, however, the record is devoid of any basis for calculating an appropriate risk premium. The "loan" in this matter was made to and is owed by the City. There is nothing in the record from which a risk premium for a loan to the City could be determined, as there is no evidence concerning the City's risk-premium factors, such as likelihood of default, as described by [defendants'] experts.

Accordingly, the judge concluded that,

> [a]lthough the Rule [r]ate may not be the exclusive basis for establishing interest payable by the City, it is the only rate presented to the Court that is grounded in the facts relevant here. This matter involves money owed by a public entity to the condemnee property owner, or, as characterized by [defendants], a "loan" from West of Pier to the City of Long Branch.

This appeal followed. On appeal, defendants argue that the judge erred in finding that interest should be determined pursuant to Rule 4:42-11 rather than by the method advocated by their experts. Defendants also assert that the City's experts were not qualified to provide expert testimony on the

appropriate rate of interest the City was required to pay. We disagree with both contentions.

Concerning the application of the interest rate established in Rule 4:42-11, we are satisfied that the judge considered all of the testimony presented by the parties, together with the extensive documentary record, and properly concluded that the rate set forth in the Rule best indemnified defendants for the loss of the use of the compensation to which they were entitled from the date of the institution of the condemnation action by the City. Given our limited scope of appellate review and deference to the fact-finding role of the trial court, we cannot substitute our review of the record for that of the Law Division. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). There was sufficient credible evidence in the record to support the trial judge's findings and conclusions. Id. at 484. We cannot fairly say that the judge's decision on the appropriate rate of interest under the particular circumstances of this case "was clearly a mistaken one" requiring our "intervention and correction." Casino Reinvestment Dev. Auth. v. Hauck, 317 N.J. Super. 584, 595 (App. Div. 1999), aff'd, 162 N.J. 576 (2000). Accordingly, we affirm substantially for the reasons set forth in Judge Grasso Jones's written opinion of March 30, 2012.

We also discern no basis for disturbing the trial court's finding that McGuire and Dr. Powell were qualified to provide expert testimony at the hearing. A trial judge is vested with wide discretion in determining whether a witness is competent to testify as an expert, and we will not disturb such a discretionary decision unless it is necessary in order to prevent "manifest error and injustice." State v. Moore, 122 N.J. 420, 459 (1991). "What we look for from the [expert] witness is 'the minimal technical training and knowledge essential to the expression of a meaningful and reliable opinion.'" Hake v. Manchester Twp., 98 N.J. 302, 314 (1985) (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 136 (1961)).

Both of the City's experts met this test. McGuire had previously testified as a real estate expert. He was a licensed real estate broker, a certified general appraiser, and a tax assessor. He regularly worked with interest rates. Dr. Powell served as the executive director for the New Jersey Economic Development Authority, later worked for various real estate development companies, and provided advice regarding the financing of various projects, including the interest rates that would be charged. Based upon these credentials, we perceive no abuse of discretion in the judges' determinations that both

witnesses were qualified to provide expert testimony on the rate of interest to be paid by the City.

Finally, defendants claim on appeal that Judge Grasso Jones failed to make a determination whether they were entitled to "interest on the unpaid interest" and whether simple or compound interest was appropriate. However, in a written amplification of her findings of fact and conclusions of law pursuant to Rule 2:5-1(b), Judge Grasso Jones explained, and the record reflects, that the parties did not address either of these issues during the evidentiary hearing. Because defendants' claims were not raised before the trial court, we decline to consider them here. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Affirmed.