NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4402-11T2
A-1873-12T2

ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION a/k/a ESSEX COUNTY VOCATIONAL AND TECHNICAL SCHOOLS,

Plaintiff-Respondent,

v.

NEW UNITED CORP.,

Defendant-Appellant,

and

CITY NATIONAL BANK OF NEW JERSEY; CITY OF NEWARK; FIRST STEPS SERVICES FOR CHILDREN, INC.; LIVING NEW, INC.; AND WEST MARKET PLAZA, LLC,

Defendants-Respondents,

and

UNITED STATES OF AMERICA; STATE OF NEW JERSEY; ESSEX COMMUNITY HEALTH SERVICES, INC.; UNITED LIVING, INC.; and MUZIK MEDIA, LLC,

Defendants.

ESSEX COUNTY VOCATIONAL SCHOOLS BOARD OF EDUCATION a/k/a ESSEX COUNTY VOCATIONAL AND TECHNICAL SCHOOLS,

Plaintiff-Respondent,

v.

NEW UNITED CORP.; CITY OF NEWARK; FIRST STEPS SERVICES FOR CHILDREN, INC.; LIVING NEW, INC.; and WEST MARKET PLAZA, LLC,

Defendants-Respondents,

and

CITY NATIONAL BANK OF NEW JERSEY,

Defendant-Appellant,

and

UNITED STATES OF AMERICA; STATE OF NEW JERSEY; ESSEX COMMUNITY HEALTH SERVICES, INC.; UNITED LIVING, INC.; and MUZIK MEDIA, LLC,

Defendants.

Argued February 24, 2014 – Decided April 8, 2014

Before Judges Parrillo, Harris, and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7474-10.

Daniel P. Silberstein argued the cause for appellant New United Corp. in A-4402-11 and respondent New United Corp. in A-1873-12 (Daniel P. Silberstein, P.C., attorneys; Mr. Silberstein, of counsel and on the briefs).

Joseph Lubertazzi, Jr., argued the cause for appellant City National Bank in A-1873-12 and respondent City National Bank in A-4402-11 (McCarter & English, LLP, attorneys; Mr. Lubertazzi, of counsel and on the brief; Danielle Weslock, on the brief).

Joseph P. LaSala argued the cause for respondent Essex County Vocational Schools Board of Education a/k/a Essex County Vocational and Technical Schools (McElroy, Deutsch, Mulvaney & Carpenter, LLP and Durkin and Durkin, LLP, attorneys (Mr. LaSala and Joshua A. Zielinski, of counsel and on the brief).

PER CURIAM

These back-to-back appeals, which we consolidate for purposes of this opinion, comprise the post-remand sequel to the failed condemnation action that we considered in New United Corporation v. Essex County Vocational-Technical Schools Board of Education (New United II), No. A-2014-10 (App. Div. April 3, 2012).[1] Defendants New United Corporation (New United) and City National Bank (City National) —— both condemnees under N.J.S.A. 20:3-2(c) —— separately appeal several aspects of the Law Division's refusal to award what they claim are sufficient damages and expenses that they allegedly incurred when plaintiff Essex County Vocational-Technical Schools Board of Education

[1] We also reviewed a separate, but related, dispute regarding the subject premises in New United Corporation v. County of Essex (New United I), No. A-3168-08 (App. Div. April 19, 2010).

(the Board of Education) was forced to terminate its initial attempt to acquire New United's unique condominium property in Newark. We affirm in part, reverse in part, and remand for further proceedings.

I.

A.

New United, along with the Essex County Improvement Authority (the Improvement Authority),[2] are condominium unit owners of a three-unit condominium regime known as United Campus, a Condominium, which controls a multi-acre site on West Market Street in Newark. The land is improved with five buildings and a parking garage, but the delineation of each condominium unit does not neatly fit within the contours of a single building or structure. For example, New United's condominium unit is comprised of a portion of the North Tower and Tenth Street buildings, and all of the CHAPS, Annex, and Compass buildings.

Almost from the start of their relationship in 1999, New United and the County were at odds. In 2004, New United sued the County seeking tort, contract, declaratory, and injunctive

[2] The Improvement Authority leased its units to the County of Essex. For ease of reference, and because the Improvement Authority has been mostly absent from the parties' disputes, we shall generally refer to the County as the owner of the two publicly owned condominium units.

remedies with respect to the alleged deteriorating physical condition of the overall campus. Among its litany of grievances, New United complained of the County's alleged neglect of its two condominium units and its failure to make repairs to storm drainpipes, a parapet wall, windows, fire protection system, and several components of the common elements.

After several years of litigation, a receiver was appointed to oversee certain remediation work that was deemed the responsibility of the condominium association, Essex Community Health Services, Inc. (the Association). In New United I, we validated the appointment of the receiver, but curtailed his overbroad mandate. New United I, supra, slip op. at 19-20. We also remanded the matter

> to address [New United's] motion for partial summary judgment, and determine the ultimate responsibility of the parties to pay for the cost of repairs and for any damages incurred by [New United]. We also direct the trial court to conduct a hearing to determine whether the Association is willing and able to complete any repairs not yet made to the condominium, and if so, to enter an order directing that the Association undertake those repairs forthwith to save future fees and expenses of having the repairs undertaken and supervised by the receiver and his consultants.
>
> [Ibid.]

At present, that litigation, now approaching its tenth year, is still unresolved.

Meanwhile, the Board of Education became interested in using the premises for a school. In New United II, we recounted the history of the Board of Education's imperfect efforts to acquire New United's condominium unit through eminent domain, and New United's redundant efforts to thwart the acquisition. New United II, supra, slip op at 3-8. We found that the Board of Education failed to engage in the "bona fide negotiations with the prospective condemnee" required by Section 6 of the Eminent Domain Act of 1971 (the Eminent Domain Act), N.J.S.A. 20:3-1 to -50, and concluded,

> The record reveals nothing that remotely resembles bona fide negotiations by the Board of Education. Rather than review and respond to New United's documentary submissions that might have illuminated several errors in judgment by the appraiser, the Board of Education steeled itself for the litigation. That conduct is the antithesis of what the Eminent Domain Act requires.
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> [New United II, supra, slip op. at 29.]

Accordingly, we ordered that "[t]he matter is remanded to the Law Division for the dismissal of the condemnation complaint without prejudice." Ibid. The present appeal stems from the Law Division's disposition of the dispute on remand.

B.

Less than one month after our remand —– over New United's strenuous objection —– the Law Division entered a May 1, 2012 order that dismissed, without prejudice, "the within condemnation action." The order required the Board of Education to "discharge its Declaration of Taking and Notice of Lis Pendens," and provided for the return to the Board of Education of its $4,850,000 deposit that was held in escrow by the Clerk of the Superior Court.

New United responded by filing a new notice of appeal, together with a motion to immediately vacate the May 1 order. On June 18, 2012, we remanded the matter for sixty days "for the court to address and resolve all outstanding issues pertaining to the dismissal of the condemnation action," and retained jurisdiction. Our sixty-day deadline turned out to be overly optimistic.

Shortly after our June 18 order, New United filed a series of motions in the Law Division seeking compensation, damages, and expenses from the Board of Education, all allegedly the result of the failed condemnation action. One motion sought "Restoration of Possession and for Associated Damages" for $37,897,674. In support of the motion, New United asserted that during the condemnation proceeding the Board of Education had

failed to ensure that electricity remained available to the Compass Building (a portion of New United's condominium unit), which forced the occupants to vacate the building and allowed "burglars to repeatedly break into the property and steal its copper piping and wiring and other metal fixtures."[3]

Another motion sought $353,466 from the Board of Education for the projected expenses related to the remediation of alleged fire code violations to the exterior façade of the CHAPS Building (also a portion of New United's condominium unit).

A third motion sought $74,748,658 from the Board of Education for "the delay in implementation of [New United's] development of the United Campus, A Condominium, caused by [the Board of Education's] unlawful condemnation." New United claimed that these development opportunities had been anticipated as part of its still-incomplete 2004 "Come Back to Newark!" project, which it pursued after the County abandoned its initial plan to relocate a hospital to its portion of the property.

[3] In New United II, we commented that New United had a 2008 appraisal of its entire condominium unit that reflected a value of $26,000,000. Although we understand that this appraisal would not necessarily be the one utilized had the condemnation action proceeded to a valuation stage, we cannot ignore that New United's present claim for damages to the Compass Building alone exceeds the 2008 opinion of value by almost $12,000,000.

A fourth motion, entitled, "Motion For Restoration of Marketability of Title to Unit C3A," sought unspecified damages to enable New United "to obtain a policy of title insurance," which would not be available "until the environmental contamination of the Compass Building, caused during the period of [the Board of Education's] ownership," is remediated. New United also sought remedies against City National precluding its collection efforts under its $2,000,000 note and mortgage.

New United's last motion, filed in late July 2012, sought "attorney[']s fees and expenses incurred for legal services provided before the Law Division pursuant to R. 2:11-4 and N.J.S.A. 20:3-26(b)" in the amount of $583,201.27. A supplemental submission with respect to attorney's fees and expenses was submitted in November 2012, which sought an aggregate reallocation of over $1.1 million.

In response to New United's "Motion For Restoration of Marketability of Title to Unit C3A," City National filed a cross-motion seeking a lien "on any recovery of New United []" and ordering the Board of Education to pay City National "at least accrued interest."

Confronted with the numerosity and complexity of the motions, the Board of Education sought relief from us with regard to the sixty-day deadline, which was scheduled to expire

on August 18, 2012. On August 23, 2012, we extended the remand period to September 28, 2012, and on September 19, 2012, we imposed a final deadline of November 28, 2012. Thus, the remand period ultimately covered approximately five months.

In that period, the Law Division permitted the parties to engage in limited discovery, and heard testimony on October 5 and 19, as well as on November 9, 13, and 15, 2012. The remand court issued a series of orders on November 27, 2012, denying all of New United's requested relief, except for attorney's fees and expenses, which were granted in part in a separate order.[4] Additionally, City National's cross-motion was denied in an order entered on November 27. New United filed an amended notice of appeal on December 5, 2012, and City National followed suit with its own notice of appeal on January 2, 2013.

[4] Earlier in the remand proceedings, on July 27, 2012, the remand court denied New United's motion seeking $353,466 from the Board of Education, largely because the condominium association, as part of the first-filed remediation litigation, was already making the repairs. However, the court entered an order in the present case stating, "Repairs to the CHAPS Building shall be completed within 30 days or the contractor chosen by New United shall be paid to do and complete the work. The work shall be done so that the fire code violations are abated." On September 21, 2012, the remand court denied New United's motion for reconsideration.

II.

A.

The Board of Education, "like all other condemnors, is constrained by the provisions of the Eminent Domain Act, and of the federal and State Constitutions that require that private property shall not be taken for public use without just compensation." Hous. Auth. v. Suydam Investors, L.L.C., 177 N.J. 2, 14 (2003) (internal citations omitted). "Just compensation means 'the fair market value as of the date of the taking determined by what a willing buyer and a willing seller, neither being under any compulsion to act, would agree to.'" Ibid. (quoting Cnty. of Monmouth v. Hilton, 334 N.J. Super. 582, 587 (App. Div. 2000), certif. denied, 167 N.J. 633 (2001).

Failed condemnations are rare —— almost unheard of. Nevertheless, the Eminent Domain Act recognizes that, even after a public entity files a declaration of taking, N.J.S.A. 20:3-17, deposits the estimated just compensation, N.J.S.A. 20:3-18, and takes title to and possession of the property, N.J.S.A. 20:3-19, the condemnor's right to exercise the power of eminent domain may be challenged and judicially undone. See N.J.S.A. 20:3-22 and 3-24. In such instances, and where condemnations are thereafter abandoned, the usual remedies sought by condemnees merely involve the reallocation of attorneys' fees and expenses

to make them whole. See, e.g., Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 532 (2009); Morris Cnty. v. 8 Court St. Ltd., 223 N.J. Super. 35, 38 (App. Div.), certif. denied, 111 N.J. 572 (1988). In this case, the Board of Education has not evinced its intention to abandon its quest to acquire New United's property, nor has it yet taken affirmative steps to initiate a new eminent domain proceeding. Accordingly, we are obliged to consider both appellants' claims under Sections 24 and 26 of the Eminent Domain Act.

Our starting point for the analysis of a condemnee's entitlement to remedies for being ill-treated begins with Section 2's definitions. N.J.S.A. 20:3-2, in pertinent part, provides the following relevant meanings:

> (g) "Action" means the legal proceeding in which
>
> (1) property is being condemned or required to be condemned;
>
> (2) the amount of compensation to be paid for such condemnation is being fixed;
>
> (3) the persons entitled to such compensation and their interests therein are being determined; and
>
> (4) all other matters incidental to or arising therefrom are being adjudicated.
>
> (h) "Compensation" means the just compensation which the condemnor is required

> to pay and the condemnee is entitled to receive according to law as the result of the condemnation of property[.]
>
> [N.J.S.A. 20:3-2(g) and (h).]

"Damages" and "expenses" are undefined.

N.J.S.A. 20:3-24 provides the following:

> If, after the filing of a declaration of taking, a judgment shall be entered dismissing the action, title to and possession of the property shall revest in the condemnee, subject to the same right, title, interest and liens as existed as of the date of the filing of the declaration of taking. In such event, condemnor shall file and record the judgment and pay any damages sustained by the condemnee as a result of the action of the condemnor, and the expenses of the condemnee.

N.J.S.A. 20:3-26(b) additionally provides:

> If the court renders final judgment that the condemnor cannot acquire the real property by condemnation or, if the condemnation action is abandoned by the condemnor, then the court shall award the owner of any right, or title to, or interest in such real property, such sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees.

Thus, under the express legislative language, a condemnee that is restored to title because of a condemnor's fatal gaffe is entitled to payment for (1) "damages sustained . . . as a result of the action of the condemnor," (2) "expenses," (3) "reasonable costs, disbursements and expenses actually

incurred," and (4) "reasonable attorney, appraisal, and engineering fees." Because no actual condemnation occurred here, there can be no "compensation" recovered under the statute. N.J.S.A. 20:3-2(h).

Nevertheless, New United contends that, in fact, a compensable taking occurred, and has characterized it as permanent in nature, even though it lasted only from September 14, 2010 (when the Board first enjoyed "the right to the immediate and exclusive possession and title to the property," N.J.S.A. 20:3-19), until May 1, 2012 (when revestiture of "title to and possession of the property" to New United and City National was accomplished, N.J.S.A. 20:3-24). Even if the May 1 order "dismissing the action" were premature, the supposed taking would still be bounded —— and temporary —— by the September 14 start date, and the date when the Law Division entered a final order calculating and awarding damages, expenses, costs, disbursements, and reasonable attorney, appraisal, and engineering fees. We find no basis in law or in logic for New United's unvarnished claim that it suffered what amounts to a permanent taking of its property.

Our task, like the remand court's task, is to review the condemnees' claims —— and their proofs —— under the lens of the statute. We cannot agree with New United's exaggerated claim of

entitlement to be compensated as if the condemnation were completed, and its citation to general principles of Fifth Amendment takings jurisprudence offers no solution. New United never argued for an appropriate time-limited just compensation award for the short-duration taking that arguably occurred here.

B.

New United bitterly complains that the remand court prematurely entered the order dismissing "the within condemnation action" as of May 1, 2012. Instead, it argues that such an order cannot be contemplated, much less entered, until all condemnees' claims for just compensation, damages, and expenses are fully litigated. To that end, New United suggested a multi-step procedure for the remand court to follow, with the first action being the dismissal, without prejudice, of the condemnation complaint. Thereafter, the parties would engage in a process leading —— at a later time —— to the "restor[ation] to each condemnee their possession of the property, subject to their right, title, interest and liens as existed as of the date of the filing of the declaration of taking."

Although there may be administrative merit to New United's proposal for an orderly transition of ownership from the Board of Education to New United, there is nothing in the Eminent Domain Act or in our decisional law that compels such a

lockstep. Here, the remand court determined to enter the dismissal order swiftly, pursuant to our mandate, with the monetary claims of the parties to follow. Because this did not contravene any established constitutional or statutory principles, we review the remand court's decision under an abuse of discretion standard.

"The right of a trial court to manage the orderly progression of cases before it has been recognized as inherent in its function." Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 488 (App. Div.), certif. denied, 165 N.J. 607 (2000). Thus, "the decision of the trial court must stand unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

The remand court's determination on May 1, 2012, was clearly in furtherance of a reasonable interpretation of our remand mandate. Nothing in New United II contemplated appellate micro-management of the remand, and it was entirely within the remand court's authority to read our command, "The matter is remanded to the Law Division for the dismissal of the condemnation complaint without prejudice[,]" as a peremptory order. New United II, supra, slip op. at 30. The May 1 order's

imprecise use of the more technically-rich word, "action," rather than "complaint," is insignificant. More important, New United suffered no cognizable prejudice from the early, rather than late, dismissal of the "action." All of its claims were preserved, and it had its day in court to try to prove them. The only thing New United lost was its invented right to be compensated before, or simultaneously with, the restoration of possession and title.

C.

We next turn to New United's demand for $353,466 for the retrofits required to correct certain fire code violations at the CHAPS building. Such a property damage claim is viable under the plain language of N.J.S.A. 20:3-24, but only insofar as such damage was sustained while the Board of Education held title. To the extent that any such damage represents any of the longstanding deficiencies New United has already alleged in its separate lawsuit against the County, it cannot recover for such harm here.

The damages in question arose from fire code violations attributable to the state of disrepair of the CHAPS building's façade, a common element for which the Association was responsible. The violations were cited during the course of a fire inspection conducted in August 2011, while the Board of

Education held title to the property. On New United's motion in the separate litigation, the court ordered on December 21, 2011, that the violations be abated within twenty-one days and, when that was not completed, ordered on February 3, 2012, that scaffolding be erected to protect the public from the façade and requiring the presentation of a plan for repair.

When the Association failed to have the work done by the time we remanded the condemnation complaint for dismissal and revesting of title to the property in New United, the remand court ordered that the Association remedy the violations within thirty days. But the court did not consider this relief to constitute compensation for damages pursuant to N.J.S.A. 20:3-24, because the condition had long existed, and the Board of Education had not affirmatively caused the damage to the façade. Consequently, it refused to specify that the Board of Education be liable to New United for any portion of the cost, in light of the Association's responsibility for common elements, but would order only that the repairs be made.

On reconsideration, the remand court appeared to revise its rationale by recognizing that New United "had fire department approval when the condemnation started, and [it is] entitled to have the same thing now that the condemnation failed." Thus, "[t]he responsibility is on [the Board of Education]. They're

[sic] the condemnor who has that responsibility." However, as long as the code violations were duly rectified by the Association without contribution from New United, such an in-kind payment of damages would suffice to satisfy any Board of Education obligation "to put [New United] partially back in the condition it was before [the Board of Education] condemned the property." The court saw no statutory requirement that New United be compensated "in cash" even though "it's [the Board of Education's] responsibility."

Our review of the record convinces us that the remand court's treatment of the façade issue was equitable and not at odds with Section 24's principle that if the condemnation proceeding is dismissed, the condemnees should be placed in the positions that they occupied prior to the taking. Because the Association is responsible for the façade in accordance with the governance of the condominium regime, ordering it to undertake the remedial work was entirely appropriate, rather than award money damages to New United, which would have to engage the Association to facilitate the repairs in any event.

To the extent that the Board of Education remains liable for ensuring the restoration of New United's status pre-taking, New United asserts that the limited repairs that the Association has undertaken were completed in an unworkmanlike manner and

insists that it be monetarily compensated for the entire deficiency —— notwithstanding any such repairs were made —— rather than in-kind. Contrariwise, the Board of Education asserts that the code violations at issue have already been satisfactorily cured and approved as abated by the fire department with no requirement for contribution from New United, and that the issue is therefore moot. Because the status of the abatement became the subject of the companion litigation, following the remand court's series of orders in November 2012, we cannot accurately determine whether the work was properly completed. Because of the Association's direct involvement, we believe that this issue is more properly resolved in the confines of that litigation rather than as an adjunct to the eminent domain proceeding. Accordingly, the remand court's decision not to award New United $353,466 was proper.

D.

New United further seeks $37,897,674 for injury to the Compass building. New United offered evidence of damage caused in part by a series of burglaries during the Board of Education's ownership that targeted "anything that was copper," including electrical equipment, plumbing, and storm drain systems. Moreover, in August 2011, the Essex County Sheriff's Department entered the building with assault weapons and

battering rams for a training exercise, which New United claims resulted in the smashing open of several locked doors and rendered the building even more vulnerable to burglary. New United's architectural expert testified that he had inspected the building numerous times during the condemnation, observed its progressive deterioration, and estimated the cost of restoring the building to full operational condition —— notably, not to its condition at the time of taking —— at the almost-$38 million amount claimed.

The remand court permitted the parties to make only a proffer of evidence regarding New United's property damage claims, truncated a full presentation, and made no particularized findings of fact with respect to (1) the condition of New United's condominium unit as of September 14, 2010, (2) the condition of New United's condominium unit at the time title revested in New United, (3) whether any or all of the claimed damage befell the property in the interim, or (4) whether the Board of Education would have been liable for any such damage. The court determined during the course of the proceedings, based on its understanding of the language of Section 24, that a condemnee could recover only for property damage affirmatively caused by the actions of the condemnor and not, for example, by burglars or "if a helicopter . . . fell out

of the sky, unless [the condemning authority was] responsible for the helicopter falling out of the sky."

We disagree with this crabbed interpretation of Section 24 expressed by the remand court. On the other hand, we do not subscribe to New United's overbroad approach to remedies available under the statute.

During the Board of Education's temporary title ownership, it did not have free rein over the property. "When an issue concerning the statutory validity of the taking arises, . . . the government takes only a defeasible title." Twp. of Readington v. Solberg Aviation Co., 409 N.J. Super. 282, 327 (App. Div. 2009). Accordingly, in this case, the Board of Education held title as if it were a fiduciary, not just for the constituency its members serve, see Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 474 (1952), but also for the condemnees whose property was involuntarily taken. As a trustee, the Board of Education was obliged to operate "within the orbit of its statutory authority, [and] it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion." Newark v. N.J. Tpk. Auth., 7 N.J. 377, 381 (1951) (internal citation omitted).

In order to potentially restore a condemnee to the condition of its property that was enjoyed when government seized title, and to avoid (or minimize) the payment of damages under Section 24, a condemnor is obliged to act prudently to avoid waste, mismanagement, or self-dealing. Thus, any deterioration in the condition or value of the taken property, other than through normal wear and tear or the result of market conditions, becomes the responsibility of the condemning authority. Moreover, it is not just responsible for active, as opposed to passive, harm that is caused during its reign of title. Among the ways a condemning authority may protect itself during this interim ownership are to acquire comprehensive property insurance; to ensure —— through litigation or otherwise —— that the Association performs its mandated duties; and to attempt to maintain the property's physical status quo. Failures to so act may expose the condemnor to significant damages if a condemnee can prove that the damage occurred during the condemnor's ownership: i.e., "as a result of the action of the condemnor," N.J.S.A. 20:3-24, where "action" means the breadth of legal proceedings defined in N.J.S.A. 20:3-2(g).

When viewed through this lens, the remand proceedings did not afford the parties a chance to demonstrate the time-limited extent of any damages suffered by New United. We reluctantly

must remand this matter again, but without the artificial time constraint we previously imposed, to facilitate a full exploration of the damages New United asserts occurred between September 14, 2010, and May 1, 2012. The Law Division shall afford the parties liberal, but managed, discovery, and shall proceed with dispatch to schedule an appropriate evidentiary hearing to consider the claims and defenses of both sides. Without making an authoritative determination here, it appears that some portion of New United's Compass building claim may be recoverable.[5] However, New United's $74,748,658 claim for lost business opportunities stands on a different footing, and is not a species of damages recoverable under Section 24.

E.

New United presented an accounting expert who estimated $74 million as the present value of cash flows New United hoped to realize from new development on the property. New United claimed that these development opportunities had been anticipated as part of its "Come Back to Newark!" project, which it pursued after Essex County abandoned its plan to relocate its

[5] On remand, the Board of Education may demonstrate that New United failed to mitigate its alleged damages during the time that New United, and some of its tenants, remained in possession of parts of the condominium unit. Cf. State by Comm'r of Transp. v. Weiswasser, 149 N.J. 320, 337 (1997) (holding that a condemnee seeking severance damages in a partial-taking condemnation action has a duty to mitigate those damages).

hospital to the campus. The project also was contemplated in negotiating its mortgage with City National, but became disrupted by the condemnation.

The cash flow losses claimed by New United are entirely speculative and noncompensable as Section 24 damages because not only were they not incurred due to the condemnor's action, but also they fail to comport with Section 24's purpose of restoring the condemnee's property to the condition it was on the date of taking. The present value of a future pie-in-the-sky is foreign to the principle of returning a condemnee to the former status quo.

If anything, New United's advocacy for this species of damages appears avaricious, bordering on the frivolous. The Law Division rightly refused to award New United statutory damages consisting of conjectural lost income. See Bell Atlantic Networks Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 101 (App. Div.) (holding that alleged lost profits that are dependent on entry into unknown markets, or the success of a new and unproved enterprise, cannot be recovered because the business venture is so risky as to preclude recovery of lost profits in retrospect), certif. denied, 162 N.J. 130 (1999); see also Seaman v. U.S. Steel Corp., 166 N.J. Super. 467, 468-75 (App. Div.) (holding that under the "new business rule,"

prospective profits of a new business are considered too remote and speculative to meet the legal standard of reasonable certainty), certif. denied, 81 N.J. 282 (1979).

Also, because New United expressly eschewed a recovery for harm that might flow from having suffered a temporary taking, it waived, and is not entitled to seek, (1) the fair market rental value of the property for the almost-twenty months that the Board of Education held title, see State by Comm'r of Transp. v. Sun Oil Co., 160 N.J. Super. 513, 527 (Law Div. 1978); (2) the "value of an 'option' to purchase the [condominium unit] for the [almost-twenty months]," Lomarch Corp. v. Mayor & Common Council of Englewood, 51 N.J. 108, 114 (1968), or (3) the damage sustained to the property through ordinary wear and tear, because such depreciation accrues regardless of the condemnor's action. New United's assertion that it endured a permanent taking further disqualifies it from seeking the lost value of a going concern operated on the property. See Kimball Laundry Co. v. United States, 338 U.S. 1, 7, 69 S. Ct. 1434, 1438-39, 93 L. Ed. 1765, 1773 (1949) (recognizing that in a temporary taking, lost value of a going concern operated on the property may be recoverable); cf. City of Trenton v. Lenzner, 16 N.J. 465, 476-77 (1954) (noting, "courts in our State and elsewhere have held that even though the taking of the land actually results in the

loss of the owner's business located thereon, he is not entitled to any independent compensation for the value of the business"), cert. denied, 348 U.S. 972, 75 S. Ct. 534, 99 L. Ed. 757 (1955). The remand court's determination that the $74,748,658 was noncompensable was correct.

F.

New United argues that its indebtedness to City National must be cancelled, and City National is obliged "to provide [New United] with a satisfaction and discharge of the condemned mortgage (November 24, 2008), the personal guarantees, assignment of rents, and other documents . . . so as to eliminate the imminent threat of litigation over liabilities the Bank believes accrued under the condemned mortgage." New United reasons that once the declaration of taking was filed and a deposit for just compensation made with the court, the mortgage was destroyed and the bank was left only with a lien on the compensation deposit.

Although the condemnation failed, there is no sound reason why the security interest memorialized in the mortgage cannot now be restored. Just because the assumptions and conditions on which the loan was made may no longer exist, a governmental entity's potential exercise of eminent domain was expressly contemplated by the mortgage instrument. Furthermore, the

parties agreed that the mortgage be "construed in accordance with the laws of the state in which the Premises is located," thereby making it subject to the Eminent Domain Act. Also, the mortgage provides, "When all of the Debt is paid, Mortgagee's right, title and interest in the Premises shall terminate." Nothing provides that eminent domain would work a stealth forgiveness or forbearance of City National's right to be paid on the loan.

The remand court denied New United relief. It agreed that City National had held a lien against the compensation deposit rather than the property while the condemnation action remained pending, but Section 24 required that the mortgage lien be restored against the property as a matter of course once the condemnation failed. That result was integral to restoring the parties to the positions they occupied before the condemnation took place.

New United correctly asserted that its payment obligation was suspended once the Board of Education filed its declaration of taking and made the deposit. City of Englewood v. Exxon Mobile Corp., 406 N.J. Super. 110, 120-21 (App. Div. 2009). Nevertheless, the Eminent Domain Act plainly provides that, once the condemnation fails, title must revest in the condemnee "subject to the same right, title, interest and liens as existed

as of the date of the filing of the declaration of taking." N.J.S.A. 20:3-24. The plain language of the statute answers the question of whether the indebtedness died when the taking occurred. It did not, and just as the Board of Education's title was defeasible during the challenge to its right to condemn, so too was the loan obligation in a state of suspended animation pending a determination of the viability of the condemnation. Once the eminent domain action was dismissed, title sprang from the Board of Education to New United, and New United's indebtedness to City National awoke from its slumber. The remand court properly denied New United's application to slay the indebtedness and discharge the mortgage.

G.

New United lastly challenges the remand court's calculation of its attorney's fee and expenses award ($197,580.77) on grounds that the court improperly (1) excluded all fees incurred after we reversed the judgment of condemnation and (2) reduced New United's requested hourly rate without a sufficient basis in the record.[6] The remand court excluded over $500,000 in attorney's fees expended following our remand in New United II on the theory that the Eminent Domain Act permitted recovery of

[6] New United sought $1,015,685 for legal services plus $98,600.47 for expenses pursuant to N.J.S.A. 20:3-26(b).

fees in a failed condemnation only insofar as such fees were incurred to defend against condemnation and that, once we remanded the matter for dismissal, there was no condemnation left to defend against. Because this theorem misconstrues the made-whole philosophy of Sections 24 and 26, the Law Division must reevaluate the attorney's fee and expenses award on remand.

After excising post-April 2012 attorney's fees, the remand court reviewed New United's submitted bills, and deducted all hours it found had been spent on the appeal, which had already been covered by a separate fee award. The court further, without elaboration, cut hours spent on "things like orders to show cause [or other] things that were not really a part of the condemnation action." It ultimately arrived at a figure of 761.8 hours of appropriate attorney time.

The court next considered the appropriate reasonable hourly rate. It noted that its "experience with condemnations is people don't get the maximum dollar," and that another attorney involved in the proceedings, whom the court recognized as "one of the foremost condemnation attorneys" in this State, did not bill in this matter for the $550 per hour that New United's counsel demanded. The court awarded an hourly rate of $250 based, in part, on the $100,000 attorney's fee award obtained by

New United for its appellate work.[7]

The court recognized that New United's counsel, a solo practitioner, was forced to limit acceptance of new clients to accommodate the workload required for this case, but it did not believe that counsel took this case with that expectation. Moreover, the issue on which New United had prevailed, the statutory requirement to negotiate in good faith, was not particularly novel or difficult, and, while counsel was certainly a "skilled litigator" and zealously advocated on his client's behalf, condemnation law was not his area of expertise when he accepted the case. In comparing the amount involved with the results obtained, the court considered that counsel claimed in excess of one million dollars in fees, yet had succeeded on only one of the arguments he advanced and spent an unreasonable amount of time on many of those that were unsuccessful. Finally, counsel had a good, longstanding relationship with his client, but had no experience in condemnation law prior to this case. Accordingly, a rate of $250 was found reasonable in light of these criteria, in the

[7] We awarded a flat sum of $100,000 without elaboration as to what portion of the claimed hours we found reasonable or what reasonable hourly fee should apply. The trial court erred insofar as it attempted to extrapolate from our award. Instead, it was obliged to conduct an independent analysis of the reasonableness of New United's application for attorney's fees and expenses.

court's judgment and experience, so the court awarded a total of $190,450 in fees, along with expenses of $7,130.77.

Longstanding public policy in this State generally disfavors departure from the salutary principle that each party bears its own litigation costs. Walker v. Giuffre, 209 N.J. 124, 127 (2012). In that vein, our rules prohibit an award of attorney's fees except where specially permitted by statute, court rule, or agreement. R. 4:42-9(a). N.J.S.A. 20:3-26(b) specifically authorizes, in pertinent part, that

> [i]f the court renders final judgment that the condemnor cannot acquire the real property by condemnation . . . , then the court shall award the owner of any right, or title to, or interest in such real property, such sum as will reimburse such owner for his reasonable costs, disbursements and expenses actually incurred, including reasonable attorney, appraisal, and engineering fees.

The statute's dual purpose is "to make the condemnee whole in respect of fees reasonably incurred in defense of the condemnation proceedings, and to encourage care on the part of the condemnor in exercising its 'awesome power.'" W. Orange, supra, 198 N.J. at 539.

The language of the statute contains no limitation to the "defense of the condemnation proceedings." Ibid. By its plain text, a reallocation award is not limited even to fees incurred in the action, but only those "actually incurred," which are

"reasonable." Id. at 540 (quoting N.J.S.A. 20:3-26(b)). Consequently, in West Orange, the Court concluded that all "reasonable fees actually incurred as a direct result of the public entity's formal action targeting [the condemnee's] property," including those incurred during the negotiation period prior to the filing of the complaint, were recoverable. Id. at 541. It follows that fees necessarily incurred in wrapping up the action —— including resolving claims for damages and expenses —— must qualify as well, because they likewise "direct[ly] result [from] the public entity's exercise of its condemnation power," id. at 544, notwithstanding the failure of that exercise. The contrary result would not satisfy the provision's "intent to return the condemnee to the position in which it would have been in had its property never been targeted." Id. at 541.

That said, a trial court must still ensure that the attorney's fees and expenses awarded are reasonable. Among the factors it may ordinarily consider, pursuant to Rule 4:42-9(b), are those outlined in the Rules of Professional Conduct:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other

> employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent.
>
> [R.P.C. 1.5(a)(1)-(8).]

The Court has specified that the fourth factor, a comparison of "the amount involved and the results obtained," is irrelevant to a proper award under N.J.S.A. 20:3-26(b). W. Orange, supra, 198 N.J. at 544-45 (internal quotation marks omitted). The ordinary premise for its application is that reasonable fees should be commensurate with the success of a party's substantive claims for relief and so proportionally reduced if some of those claims prove unsuccessful. Id. at 544. Because the reasonableness of a defense strategy meant to defeat condemnation, on the other hand, does not turn on the individual success or failure of "each of [its] moving parts," the factor has no applicability here. Id. at 544-45. We see no

significant difference between defending against an improvident taking and prosecuting claims for statutorily-authorized damages and expenses under Sections 24 and 26. Fees and expenses, if reasonable, are eligible for reallocation in both circumstances.

In either case, a trial court may still consider

> the substance of the work performed. Pivotal to such an inquiry is whether the defenses interposed to the condemnation were those that a reasonably skilled attorney would have advanced. Thus, . . . the court need not award fees to a condemnee for advancing frivolous defenses, or for taking repetitive or delaying actions, or for actions necessitated by a lawyer's mistakes, or for those that are not legitimate responses to a condemnation complaint. In making such assessments, the trial judge may look to the success of defendant's strategies, not as a bright line rule, but as one measure of what a reasonably skilled attorney would have done.
>
> [Id. at 545.]

A reviewing court will not disturb a fee award on appeal except for clear abuse of discretion. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). Here, the remand court first mistakenly exercised its discretion in determining the time reasonably spent in the matter, because it improperly excluded any time spent after our reversal and remand in New United II. Its further decision to exclude any fees incurred on orders to show cause or "other things" collateral to the condemnation is inscrutable as to whether the fees were

legitimately irrelevant or excluded only by application of the court's improper interpretation of the statute. Moreover, although the chosen rate of $250 per hour was not unreasonable on its face, it likewise is not sustainable. The court explicitly considered a factor —— comparison of the amount involved with the results obtained —— that is inappropriate in this context, W. Orange, supra, 198 N.J. at 544, at least as applied to fees incurred prior to the failure of the condemnation. The remand court then appeared to illogically weigh the same factor in comparing its chosen rate with the rate it speculated had been used by us in crafting the award for appellate attorney's fees and costs. The court must therefore reevaluate the entire fee and expense award on remand and, specifically, must include in that award any fees and expenses reasonably incurred even after the judgment of condemnation was reversed.

H.

City National appeals the remand court's denial of a lien on any damages recovered by New United in this matter. It argues that issuance of such a lien is demanded by the plain terms of its mortgage agreement, which provides:

> Mortgagor gives and grants to Mortgagee an exclusive security interest in . . . any and all awards, damages, payments and other compensation, and any and all claims

> therefor and rights thereto, which may result from taking or injury by virtue of the exercise of the power of eminent domain[.]

The remand court preliminarily denied City National a lien without any explanation. It revisited the issue at the close of the hearings but deemed the issue moot, because the only recovery it had permitted New United was for attorney's fees and expenses. It considered the attorney's fees and expenses award "personal" and independent of any economic damages to which a lien contemplated by the mortgage might attach.

A mortgagee ordinarily has a right to a lien on any compensation for loss of the value of its security incident to a taking by eminent domain, subject, of course, to the terms of any agreement with the mortgagor. City of Orange Twp. v. Empire Mortg. Servs., Inc., 341 N.J. Super. 216, 221-22 n.1 (App. Div. 2001) (citing Restatement (Third) of Property, Mortgages § 4.7 (1996)). Such an agreement, to the extent unambiguous, must be enforced according to its plain terms. James v. Fed. Ins. Co., 5 N.J. 21, 24 (1950). An interpretation of a contract is a legal question for the court. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011).

The mortgage agreement unambiguously requires that a security interest be applied to any "awards, damages, payments and other compensation, . . . which may result from taking or

injury by virtue of the exercise of the power of eminent domain." Accordingly, an equitable lien to protect such a security interest is both necessary and appropriate to guaranty fidelity to the intention of the contracting parties.

Nevertheless, as the remand court sensed, the lien shall not attach to an attorney's fee and expenses award. Such an award is independent of just compensation for a taking, Jersey City Redev. Agency v. Clean-O-Mat Corp., 289 N.J. Super. 381, 401 (App. Div.), certif. denied, 147 N.J. 262 (1996), and operates wholly independent of the property that secures the mortgage. As such, it does not constitute "awards, damages, payments and other compensation, . . . which may result from taking or injury by virtue of the exercise of the power of eminent domain." On remand, the Law Division shall grant City National an equitable lien on any recovery that it awards New United in accordance with the principles outlined in this opinion.

City National further contends that the Law Division was obliged to award it, as statutory damages, the amount of accrued interest payments it did not receive from New United during the failed condemnation. We observe that even if City National were precluded from proceeding against its obligor (and perhaps even its guarantors) during the extant condemnation proceedings,

see, e.g., City of Orange v. Empire Mortg., 341 N.J. Super. 216, 225-26 (App. Div. 2001), the bank suffered no independent compensable loss attributable to the non-payment of interest because interest continued to accrue, and City National's right to receive its full contract benefits was never extinguished. Delay was merely one collateral consequence of the lending contract and the defeasible nature of the title temporarily lost to the condemnor. Any consequential lessening of profitability on the loan was damnum absque injuria —— a harm without injury in the legal sense —— in this eminent domain proceeding. See State ex rel. Com'r of Transp. v. Dikert, 319 N.J. Super. 310, 321 (App. Div.) (collecting cases), certif. denied, 161 N.J. 150 (1999). The Law Division did not err in refusing to order the Board of Education to pay City National for postponed interest payments.

III.

In summary, we affirm the Law Division's May 1, 2012 dismissal of the condemnation action. We further affirm the court's disallowance of New United's claim for $353,466 for the projected expenses related to the CHAPS Building, and New United's claim for $74,748,658 for "the delay in implementation of [New United's] development of the United Campus, A Condominium, caused by [the Board of Education's] unlawful

condemnation." We reverse and remand for further proceedings New United's claim for $37,897,674 for damages suffered to the Compass building during the period between September 14, 2010, and May 1, 2012, as well as New United's entire demand for reallocated attorney's fees and expenses. Lastly, we reverse the denial of the imposition of an equitable lien in favor of City National, and remand for the entry of appropriate relief in accordance with the principles of this opinion.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.[8]

[8] We deny New United's February 11, 2014 motion to supplement the appellate record with information regarding the Board of Education's insurance coverage. New United may seek to introduce such information as part of the remand proceedings, subject to the rules of evidence, but we express no opinion as to its evidentiary value, relevance, or admissibility.