

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

CASE LEASING & RENTAL, INC.

Plaintiff

v.

OHIO DEPARTMENT OF NATURAL RESOURCES

Defendant

Case No. 2005-08034

Judge J. Craig Wright
Magistrate Lee Hogan

DECISION

{¶ 1} On February 11, 2009, the magistrate issued a decision recommending judgment for plaintiff in the amount of \$4,235,444, consisting of \$2,735,000 for loss of real property market value, \$551,119 in personal property loss, \$949,300 in interest costs, plus \$25 for the cost of filing this action.

{¶ 2} Civ.R. 53(D)(3)(b)(i) states, in part: “A party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Both parties have timely filed objections.

{¶ 3} Plaintiff, Case Leasing and Rental, Inc., is an Ohio corporation and owner of 21 acres of land in Mercer County, Celina, Ohio. The property is located adjacent to Beaver Creek and several hundred yards downstream from the intersection of Beaver Creek and the western shoreline of Grand Lake St. Mary’s (GLSM). In 1976, plaintiff completed construction of, and opened, the Lake Front Racquet and Health Club (RecPlex) on that property. The RecPlex was an 87,500 square foot facility that

provided a wide variety of indoor and outdoor fitness and recreational activities for the general public. Plaintiff owned the RecPlex continuously, except for a period from October 2001 to September 2003. In early July 2003, a severe storm passed through the GLSM area. As a result, an extensive amount of water was discharged from the lake into Beaver Creek, flooding plaintiff's property and thousands of other acres along the creek. The first floor of the RecPlex flooded to a depth of approximately three feet. The lower level facilities were completely submerged.

{¶ 4} Plaintiff filed this case alleging claims of negligence, nuisance, absolute nuisance/nuisance per se, trespass, and unconstitutional taking without just compensation. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 5} Following a trial to the court on the issue of liability, the court issued a decision wherein the court stated:

{¶ 6} "Applying the 'reasonable use' analysis to the facts established in this case, the court does not dispute utility of ODNR's dam safety objective; however, balanced against the gravity of the foreseeable and avoidable harm caused, the court finds that the manner in which ODNR implemented its objective was unreasonable and negligent."

{¶ 7} " * * * Similarly, the court finds that ODNR's post-1997 management of lake levels was unreasonable in light of the foreseeable damage that could have been avoided had it utilized manual draw-down alternatives."

{¶ 8} In the subsequent trial to a magistrate of this court, plaintiff sought damages totalling \$5,296,344.80 that consist of four components: I) loss of market value to the real property; II) loss and/or damage to the personal property contained within the RecPlex, including ancillary expenses incurred in restoring such property; III) loss of revenue incurred during the eight months that the RecPlex was closed following the flood and during the nearly two years that it took to rebuild the customer base to its pre-flood level; and IV) interest paid and accruing on loans taken out to pay for restoration of the RecPlex.

{¶ 9} Defendant's primary objection is that the magistrate erred by awarding plaintiff compensation for the loss in market value of plaintiff's real property while also awarding plaintiff compensation for costs associated with repairing the damage and

restoring much of the property to its original condition. Defendant contends that such an award is unsupported by Ohio law and produces a windfall to plaintiff.

{¶ 10} Plaintiff sought \$2,735,000 in damages for the loss of market value to its real property including the value to the physical structure or “shell” of the RecPlex building and the golf course property upon which it was situated. The decision to award compensation to plaintiff for the loss of market value was based upon the magistrate’s determination that the damage to the RecPlex and the golf course was “permanent” rather than “temporary or repairable.” Defendant has challenged this finding.

{¶ 11} As the magistrate correctly noted, Ohio law on this issue was reviewed and summarized by the Second District in *Klein, et al. v. Garrison* (1951), 91 Ohio App. 418:

{¶ 12} “[T]he case law which we have examined indicates that where the injury abates by discontinuance of the wrong, or where the owner by his act can abate the wrong, the injury is held to be temporary. * * * Where the injury still remains after the discontinuance of the wrong and will exist indefinitely and require the expenditure of time, effort and money to restore the land to a semblance of its original condition, the injury is held to be permanent. In law an injury may be considered to be permanent although not perpetual.” *Id.* at 430.

{¶ 13} The magistrate’s decision states:

{¶ 14} “Specifically, even though plaintiff was able to reopen the RecPlex, the spillway design has not been changed, nor is it conceivable that it will be in the near future; therefore, continued intermittent flooding is inevitable. Indeed, the evidence establishes that flooding did again occur in January 2005 and in February 2008, and that the RecPlex closed for a short time in 2008 as a result of that flood. In addition, plaintiff testified that after the 2003 flood, he constructed a dike around the property to prevent or minimize future flooding but that such effort was to no avail.”

{¶ 15} The court agrees with the magistrate’s analysis and, based upon the totality of the evidence, the court finds that the damage to plaintiff’s real property was permanent. The magistrate also found that plaintiff had proved, by a preponderance of the evidence, that it suffered a loss of \$2,735, 000 in the market value of his property. The evidence supports the magistrate’s finding.

{¶ 16} However, having determined that the damage was permanent, plaintiff's compensation is limited by Ohio law to the diminished value of the real property rather than the cost of repair. See *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238; *Klein*, supra.

{¶ 17} In other words, the loss of market value of the property represents the extent of defendant's liability and the limit of plaintiff's recovery. Id. See also Restatement of the Law of Torts Second §162, p. 291-292, comment (e).¹

{¶ 18} In this case, when plaintiff chose to repair the RecPlex and reopen the business, plaintiff did so with full knowledge that the spillway design had not been changed, that it was likely to remain unchanged for some time, and that continued intermittent flooding was inevitable. Under such circumstances, the decision to repair and reopen the RecPlex was at plaintiff's own expense and at plaintiff's own risk. Thus, the award of interest charged upon the sums borrowed by plaintiff to finance the repair of the RecPlex, the purchase of new equipment and the ongoing operation and maintenance of the RecPlex was erroneous. Accordingly and to account for the error, plaintiff's award must be reduced by \$949,300.

{¶ 19} With respect to the award of damages for the loss of personal property, the magistrate noted "[d]efendant does not contest the amount claimed for this component of plaintiff's damages, or the manner in which the damages were

¹Section 162. Extent of Trespasser's Liability for Harm.

"A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser.

"Comment:

"* * *

"e. Effect of a permanent change in the condition of the land. A continuing trespass must be distinguished from a trespass which permanently changes the physical condition of the land. Thus, if one, without a privilege to do so, enters land of which another is in possession and destroys or removes a structure standing upon the land, or digs a well or makes some other excavation, or removes earth or some other substance from the land, the fact that the harm thus occasioned on the land is a continuing harm does not subject the actor to liability for a continuing trespass. *Since his conduct has once for all produced a permanent injury to the land, the possessor's right is to full redress in a single action for the trespass*, and a subsequent transferee of the land, as such, acquires no cause of action for the alteration of the condition of the land." (Emphasis added.)

calculated.” The court’s review of Plaintiff’s Exhibit 3 and the testimony regarding personal property loss reveals that the magistrate’s determination was supported both by the law and the weight of the evidence. To the extent that defendant now objects to the amount of the award, such objection is without merit.

{¶ 20} In regard to plaintiff’s objections, plaintiff takes exception to the magistrate’s refusal to award any damages for profits allegedly lost during the time when the RecPlex was being rebuilt. The magistrate concluded that plaintiff failed to prove either the existence or amount of lost profits with the required degree of certainty.

{¶ 21} Given the fact that the damage was permanent, the court finds that future lost profits, if any, are not a recoverable element of plaintiff’s damages. As stated above, the proper measure of damages under such circumstances is the loss of market value. The value of the RecPlex and golf course as a “going concern,” which value necessarily includes an element of profitability, could have been included in the calculation of the pre-injury market value of the property. See *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, 459; *Wray v. Stvartak* (1997), 121 Ohio App.3d 462. The court notes that plaintiff’s appraiser chose not to value the real property based upon the income capitalization approach and plaintiff did not produce evidence of such value at trial. Rather, plaintiff sought an award for future profits allegedly lost during reconstruction. In the court’s opinion, an award of lost profits to plaintiff for any period of time beyond July 2003 results in a windfall. Moreover, even if future lost profits were recoverable in this action, the court agrees with the magistrate that such profits were not proven with the required degree of certainty. Accordingly, plaintiff’s objection is **OVERRULED**

{¶ 22} Upon review of the record, the magistrate’s decision and the objections, the court finds that the magistrate has properly determined the factual issues and appropriately applied the law, with the exceptions noted herein. Defendant’s objections are **SUSTAINED** as they relate to the award of interest charges in the amount of \$949,300, but **OVERRULED** as they relate to the remaining award of damages. Plaintiff’s objection is **OVERRULED**. Accordingly, the court shall adopt the magistrate’s decision and recommendation as herein modified.

{¶ 23} Judgment shall be rendered for plaintiff in the amount of \$3,286,144 which includes the filing fee paid by plaintiff.

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JUDGMENT ENTRY

For the reasons set forth in the decision filed concurrently herewith, the court adopts the magistrate's decision and recommendation as modified therein.

Judgment is rendered for plaintiff in the amount of \$3,286,144 which includes the filing fee paid by plaintiff. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

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