Real Property – Eminent Domain – Apportionment of Award Between Lessor and Lessee

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Recommended Citation
F. Stewart Elliott, Real Property – Eminent Domain – Apportionment of Award Between Lessor and Lessee, 8 U. Miami L. Rev. 137 (1953)
Available at: https://repository.law.miami.edu/umlr/vol8/iss1/17

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plaintiffs were given leave to dismiss\textsuperscript{10} under Rule 41(a)(2),\textsuperscript{20} which provides for dismissal by order of court upon motion, and specifically provides that such dismissal will be without prejudice in the absence of an order to the contrary.

Requiring plaintiffs to proceed under Rule 41(a)(2) will necessitate further time and expense on the part of both plaintiff and defendant, apparently conflicting with the spirit of Rule 1 of the Federal Rules of Civil Procedure, calling for construction of the rules to secure a just, speedy and inexpensive determination of every action. The Court's decision in this case creates the necessity for a further interpretation of Rule 41(a)(1) in each new case that arises as to what is an "advanced stage of a suit."

Charles R. Carman.

**REAL PROPERTY — EMINENT DOMAIN**

**APPORTIONMENT OF AWARD BETWEEN LESSOR AND LESSEE**

The plaintiff's leased property was taken by the City of Miami Beach under eminent domain. An offer by the City of $50,000 was accepted by landlord and tenant, but no express agreement was made as to the apportionment. Held, payment of the award is to be made to the lessor as substitution for the land. The lessee's interest is satisfied by a reduction of the rent equal to the return an investment would bring of the award in the highest grade securities. Raleigh Operating Co. v. Naglo Corp., 3 Fla. Supp. 111 (1953).*

Although the Florida Constitution guarantees full compensation for the taking of land by condemnation proceeding,\textsuperscript{1} there have been no reported cases in Florida determining the apportionment of the award between lessor and lessee. It cannot be doubted that the lessee has a definite property interest in the condemned land,\textsuperscript{2} but there is no uniform rule applied by all jurisdictions to determine the exact amount to be granted in the absence of an apportionment agreement in the lease. Full

\textsuperscript{19} Harvey Aluminum, Inc. v. American Cynamimid Co., 203 F.2d 105, 108 (2d Cir. 1953).

\textsuperscript{20} "By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

*Editor's note: This case is on appeal.

\textsuperscript{1} Fla. Const. Art. XVI § 29; see Adell v. Boynton, 95 Fla. 984, 117 So. 507 (1928); Weed, Florida Law of Real Estate 94-95 (1st ed. 1926).

\textsuperscript{2} Kohl v. United States, 91 U.S. 367 (1875); United States v. 26,699 Acres of Land, 174 F.2d 367 (5th Cir. 1949); Korf v. Fleming, 239 Iowa 501, 32 N.W.2d 85 (1948).
compensation for the taking by eminent domain has been held to be fair market value, but this term in itself has little meaning, requiring further criteria. Often, the lease in question may have no market value at all.

Courts faced with the problem of ascertaining the lessee’s interest have applied numerous tests. Twenty-nine states have applied the “before and after value rule,” holding that the measure of damages for land taken by eminent domain is the difference between the value of the leasehold interest before the taking and the value after the taking. The difficulties encountered by the use of this rule are in trying to place a fair market value on the leasehold after condemnation. Other courts have concluded that there is no market value for a lease after condemnation of the leased property and have applied the “intrinsic value rule,” which in effect uses the lessee’s valuation of the property as the basis for determining the amount of the award. This solution is open to criticism since too much latitude is left to the discretion of the court. Still other courts have resolved the problem on the theory of “deprivation of right,” maintaining that every person has the right to remain in undisturbed possession until the end of his term and damages shall be paid for the infringement of this right. The actual measurement of such an interest is again, in the final analysis, left to the discretion of the court. In Massachusetts the problem was settled by statute which set forth a detailed formula.

In yet other jurisdictions the “use rule” or “business

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6. ibid. No other conclusion can be reached.
8. Ibid.
10. Ibid.
11. Mass. Gen. Laws c. 79 § 24 (1921). The pertinent part of this statute is as follows: “If a tenant for life or for years and the remainderman or reversioner sustain damages through condemnation . . . entire damages . . . shall be paid to . . . any person whom the parties may appoint, and be held in trust by him for their benefit according to their respective interests. The trustee shall, from the income thereof, pay to the reversioner . . . the value of any annual rent . . . which would, but for such . . . taking, have been payable by the tenant, and the balance thereof to such tenant during the period for which his estate was limited, and upon its termination, he shall pay the principal to the reversioner . . . ."
value theory" has been applied. Under this rule the fair market value is based on what use the lessee makes of his leasehold, excluding recovery for expectant profits. While testimony is taken by appraisers the court still has wide discretion in determining the actual amount of the award.

The "investment securities rule" which was applied in the instant case entails giving the full award to the lessor, in contrast to other methods where the court apportions the award between the parties at the time of the judgment. The lessor must invest the award in highest grade securities and the lessee gets the interest therefrom during the unexpired term of the lease. However, investment of the award was not decreed in the principal case because the lessee's interest was substantially protected since the rental payments far exceeded the return from the investment. The advantage of the "investment securities rule" is that the court does not get involved in a maze of technicalities and formulas. The only scale that is applicable is the economic change in the security market, and this is guarded against by the court retaining jurisdiction as was done in the instant case, where the chancellor set the amount temporarily at three and one-half per cent. This method removes a high percentage of the "crystal gazing." A disadvantage of this, or any fixed rule, is that it is arbitrary and does not take into account other equitable factors such as the premium value placed on commercial property as distinguished from residential property.

It is difficult to see how any one rule can fill the need or supply the answer in apportionment disputes. Each case should be taken on its own merits. It is suggested that those contracting in real estate should provide for apportionment of award in the event of condemnation in order to avoid the effect of a court decision in this involved and nebulous area.

F. Stewart Elliott.

TORTS—FEDERAL TORT CLAIMS ACT DISCRETIONARY FUNCTION EXCEPTION

Ammonium nitrate fertilizer stored in vessels in Texas City harbor exploded, causing 560 deaths and extensive property damage. An action against the United States alleged Government liability for the negligence of its employees in manufacturing, packing and shipping the fertilizer.

14. See note 5 supra.
15. See note 11 supra.

2. In re Texas City Disaster Litigation, 197 F.2d 771 (5th Cir. 1952).