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IN THE SUPREME COURT OF MISSISSIPPI

CA
CAUSE NO. 2008-~~PS~~-02105

DEDEAUX UTILITY COMPANY, INC.

FILED

APPELLANT

VS.

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CITY OF GULFPORT, MISSISSIPPI
A MUNICIPAL CORPORATION

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APPELLEE

APPEAL FROM THE SPECIAL COURT OF EMINENT DOMAIN
HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT

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ARGUMENT AND AUTHORITIES

INTRODUCTION

The City understands that it is to limit its discussion in this Reply Brief to the issues raised in the City's cross-appeal and the response thereto by Dedeaux.

I. THE CITY IS ENTITLED TO RECOVER INTEREST FROM DEDEAUX FOR THE PERIOD OF TIME DEDEAUX USED THE FUNDS BELONGING TO THE CITY.

Dedeaux asserts that **Miss. Code Ann. §75-17-7** should not be applied to assess interest on Dedeaux's use of the City's funds because (1) this code section does not apply to eminent domain judgments and (2) there was no "judgment" entered in this cause. Dedeaux brief, P. 26 The Trial Court's award of compounded interest was contrary to the eminent domain statutes. The City's action to recover the excess funds it paid to Dedeaux was not an action under the eminent domain statutes even though the claim was made within the framework of the pending cause in the Special Court of Eminent Domain. When the Special Court of Eminent Domain has subject matter jurisdiction, it has pendent jurisdiction to decide matters which arise within the course of the litigation. *McDonalds' Corp. v. Robinson Industries, Inc.*, 592 So.2d 927 (Miss. 1991). Such pendent jurisdiction, when exercised, does not cause the Court's ruling on the issue to be an "eminent domain judgment".

The City submits that a "judgment" was entered by the Trial Court awarding the City the sum of Six Hundred Ninety Eight Thousand Six Hundred Four and 86/100 (\$698,604.86) Dollars. Rule 54, MRCP, defines the term judgement as including "a final decree and any order from which an appeal lies." An order was entered by the Trial Court on February 15, 2007,

requiring the amount of the excess interest¹ to be paid to the City. CP. 66-69. Although the February 15, 2007, order did not contain the MRCP 54(b) certification necessary to make it appealable at that time, the City submits that it became appealable upon the entry of the jury verdict in this cause. Thus, the order allowing the City to recover the excess interest is a “judgment”.

There is no legal impediment preventing the City from recovering interest on the excess amount paid to Dedeaux. There are no equitable factors which would support the free use of the City’s money by Dedeaux for about two (2) years. The City requests this Court to remand this issue to the Trial Court for a hearing on a reasonable rate of interest the City should recover on its funds.

II. THE VALUATION TESTIMONY OF JAMES ELLIOTT SHOULD HAVE BEEN EXCLUDED PURSUANT TO MRE 702.

Dedeaux contends that James Elliott’s valuation of the certificate of convenience and necessity (certificate) was admissible because Elliott used the income method of valuation. Dedeaux would have the Court end its analysis with a determination that the income method of valuation is a method accepted in the appraisal industry. The City submits that Dedeaux failed to address the primary deficiency of Elliott’s valuation method.

Mr. Elliott’s valuation failed to meet the requirement under MRE 702(3) “the witness has applied the principles and methods reliably to the facts of the case.” It is undisputed that the physical facilities (water & sewer lines, pump stations, etc.) and the certificate work together to produce the income and growth for Dedeaux and the contribution of each cannot be separately estimated. CP. 219-221. Dedeaux failed to offer any explanation supporting Elliott’s allocation

¹Dedeaux had earlier paid the excess interest into the Registry of the Court.

of all of the projected future cash flow for fifteen years to the certificate. Dedeaux merely stated that Elliott "... then discounted that total amount of projected cash flow after 1996 ... to arrive at his conclusion of \$800,388, as the present value of future rate-based income which would likely have been received by Dedeaux during the 15 year period, but for this condemnation." Dedeaux brief, p. 30.

The City submits that the income method of valuation depends on one's ability to properly determine the income (cash flow) which has been and will be produced by the entity or asset which is being valued. Mr. Elliott estimated the future income which would be produced by the total operations of Dedeaux (the entity). Elliott valued only one asset (the certificate) of the entity by allocating all of the income of the entity to that one asset. Elliott did not apply the principles and methods (of the income method of valuation) reliably to the facts of the case.

Dedeaux also asserts that Elliott's use of estimated future contributions in aid of construction to value the certificate comply's with the requirements of MRE 702. The City submits that Dedeaux's reliance on *Bear Creek Water Association v. Town of Madison*, 416 So.2d 399 (Miss. 1982) for the proposition that future contribution in aid of construction must be used to value the certificate is unfounded. The Court in *Bear Creek* listed several elements of value which should be considered or examined. *id.* at 402. Included in the list was "... the probability of its receiving the water facilities installed by the subdivision developer², the probability of residential growth ...". Dedeaux insists that this language requires a value be placed on the estimated future contributions in aid of construction (and the estimated future income) in order to value the certificate. A reading of the entire *Bear Creek* opinion shows

²Facilities which existed on the date of taking but not yet donated to Bear Creek.

Dedeaux's position is incorrect. The Court in *Bear Creek* held that the elements should be considered in valuing the entire business, not just the certificate, before and after the taking. Even if the value of future contributions in aid of construction could properly be used in valuing the certificate, Dedeaux failed to provide a rational basis for attributing all of the future contributions in aid of construction to the certificate and none to the operating assets.

III. THE BENEFITS TO THE CITY RESULTING FROM THE CONDEMNATION WERE OFFERED TO ESTABLISH THE HIGHEST AND BEST USE, CONTRARY TO ESTABLISHED LAW.

Dedeaux asserted on Page 37 of its brief that, based on the opinion in the first appeal of this case, "... the question of whether it was reasonably probable that the Dedeaux system would be incorporated into a larger, unregulated publicly owned utility was not to be addressed at the retrial." The City has been unable to find such language in the Court's opinion. There was never an issue in the first appeal regarding the incorporation of the Dedeaux system into a larger unregulated public utility. There was no evidence presented by Dedeaux that, on the date of taking, it was reasonably probable that in the future Dedeaux would operate its system as an unregulated utility.

The Trial court allowed Dedeaux to present evidence that the highest an best use of the utility system was to be taken by the City of Gulfport. Dedeaux says that James Elliott's testimony was "... detailing the benefits of non-regulation in general ...". Dedeaux brief, p. 39. A review of the record reveals that Elliott consistently referred to the City as the "willing buyer" of the Dedeaux utility system.

And looking at the highest and best use of the property and again, we will get into this in a minute, it was totally surrounded by the City of Gulfport. T. 997.

In any retail business location is a very important factor in it's value. In the, (sic) the better the location the better the value. And Dedeaux is a small system totally

surrounded by the City of Gulfport. T. 997-998.

In actuality you have a more than willing buyer who is Gulfport. They're so willing to buy that they filed an eminent domain action. T. 999.

I have to assume that there's a hypothetical city instead of Gulfport that totally surrounds Dedeaux Utility. T. 999.

After letting the jury know that the City of Gulfport was the only "willing" buyer considered as a potential purchaser, Elliott proceeded to describe to the jury the benefits the City would obtain by acquiring the Dedeaux system.

Well by virtue of a sale to a much larger water and sewer company here's the benefits you get. You get to reduce your operating cost of the system through economics of scale. ... If you're an unregulated utility that's a public body³ you can acquire capital at much lower rates. You don't have to pay taxes on the income. ... T. 1002

You can spread the cost of acquisition, the cost of acquiring the system, you can spread it over a much larger base, over a much larger number of customers so that the impact on the customers is considerably less that if you just spread that cost of acquisition just on the Dedeaux Customers. T. 1002

You can charge – your service charges are not regulated by the Public Service Commission.⁴ ... T. 1002.

...

You can use the assets for a much more diverse purpose than say a small, self-contained unit like Dedeaux can. You can facilitate growth. You can improve fire protection. You can do a lot of things if a bigger system owns it. T. 1004.

You can eliminate the very expensive need of extending water and sewer mains around and through Dedeaux. In other words, if this hypothetical buyer that is surrounding Dedeaux doesn't own Dedeaux they've still got to get water and sewer service either around it or through it. That's very expensive, very

³The City of Gulfport being the only public body Elliott considered as a purchaser.

⁴This is the only item listed by Elliott which relates to any unregulated purchaser.

expensive cost.⁵ T. 1004

You can derive a number of indirect benefits from ownership of the assets in addition to water and sewer revenue and I can't get into all that today. But the indirect benefits and sometime (sic) could be substantially more than the direct benefits in terms of water and sewer sales and this type of thing. T. 1004.

The City submits that Elliott's testimony about deriving "... a number of benefits from ownership of the assets..." was not related to the benefits of non-regulation in general but instead was aimed at telling the jury that the purchaser (the City) should pay more for the utility because part of the cost of acquisition would be recovered by the City through the benefits obtained by the City. Dedeaux did not offer any evidence that the value of the Dedeaux utility system was diminished by rate regulation. The only evidence offered by Dedeaux relating to rate regulation was Elliott's testimony that the service charges of a non-regulated entity are not regulated by the Public Service Commission. This testimony falls far short of reliable evidence that regulation diminishes the value of a utility. There was no testimony that the regulation of rates by the Public Service Commission caused the value of Dedeaux to be diminished. Instead, Dedeaux was allowed to offer evidence that the acquisition by the City caused the value of Dedeaux to increase because of the benefits the City would obtain by the acquisition.

IV. THE EVIDENCE PRESENTED BY DEDEAUX CLEARLY SINGLED OUT THE CITY OF GULFPORT AS BEING UNDER A COMPULSION TO BUY THE DEDEAUX SYSTEM IN ORDER TO JUSTIFY A HIGHER VALUE FOR THE SYSTEM.

The City submits that Dedeaux presented testimony designed to convince the jury that the City needed the subject utility system so much that the City should pay a higher price for the system. Dedeaux contends that the testimony "... was not singling out Gulfport as the condemnor

⁵Here Elliott explains that the City will save a lot of money by obtaining the system.

requiring the property ...". Dedeaux brief, P. 40. The record does not support Dedeaux's contention. The questions asked by the Dedeaux attorney clearly referred to the City as the only purchaser.

Can you explain why a city, a willing buyer, would be willing to pay that amount even though they're not going to take it out of the ground? T. 1042, l. 25.

Well, what options, what options does the city – I'm trying to see why – they're not going to have to pull it up so we're talking about a hypothetical willing buyer and a hypothetical willing seller. T. 1043, l. 1

The answers of James Elliott certainly singled out the City when he stated:

In a case like Dedeaux Utility where a condemnor wants a specific piece of property ...⁶ 1043

...

He can't substitute another piece of land or another utility system for this utility system because he wants the hole in the donut.⁷ T. 1044.

The testimony concerning the City being under a compulsion to purchase the system was not harmless error. It allowed the jury to determine that the City should pay more for the system than any other buyer because the City had to have this system. This testimony, when combined with the testimony about the benefits the City would receive by acquiring the system, denied the City a fair trial on the issue of just compensation.

V. THE ERROR IN GRANTING JURY INSTRUCTIONS NO. D-3, NO. D-4, NO. D-6A AND NO. D-7 WAS NOT CURED BY OTHER INSTRUCTIONS.

When valuing a utility system, it is reversible error to instruct the jury concerning separate elements of damages such as the value of a certificate of convenience. *City of Jackson*

⁶The City's objection to testimony concerning a buyer under a compulsion was overruled.

⁷This was a clear reference to the City surrounding the Dedeaux system.

v. Creston Hills, Inc., 172 So.2d 215 (Miss. 1965). The Trial Court below not only instructed the jury concerning the value of the certificate of convenience (No. D-3) but also separately instructed the jury concerning contributions in aid of construction (No. D-4 & D-7); using the cost to overcome “constraints” in determining the replacement cost of the water and sewer facilities (No. D-9)⁸; the present worth of contributions in aid of construction (No. D-7); and, the present worth of future cash flow (No. D-7).

The effect of these jury instructions was to peremptorily instruct the jury to accept James Elliott’s method of valuation. The cumulative adverse effect of these several erroneous instructions was not cured by the Court’s instruction in No. C-1 that the jury was not to single out one instruction.

VI. UPON REMAND, THE TRIAL COURT SHOULD BE INSTRUCTED TO DETERMINE WHETHER CIRCUMSTANCES STILL WARRANT A CHANGE OF VENUE.

Dedeaux presented no factual reason why the Court should not require the issue of venue to be revisited considering the original order was entered approximately seven and one-half (7 ½) years ago. A remand of this case in essence begins everything anew. Inasmuch as the request for a change of venue was based on newspaper articles alleged to have biased potential jurors against utilities in general, no harm could come from having the Trial Court determine if any such bias still exists. The City submits that if this cause is remanded for other reasons, the Court should instruct the Trial Court to determine whether circumstances still warrant a change of venue.

CONCLUSION

Dedeaux Utility Company, Inc., wrongfully used for two (2) years Six Hundred Ninety

⁸Contrary to the principal of “cost new” accepted in the appraisal industry.

Eight Thousand Six Hundred Four and 86/100 (\$698,604.86) Dollars belonging to the citizens of the City of Gulfport. It is unknown how much money Dedeaux earned through the use of this money but one must assume that Dedeaux did not bury the money in a mayonnaise jar. Dedeaux should be required to pay the City reasonable interest for the use of such funds.

The City was denied a fair trial regarding just compensation as a result of the cumulative effect of numerous evidentiary errors and numerous errors related to the instruction of the jury regarding the determination of just compensation. The evidence allowed to be presented by Dedeaux was contrary to accepted valuation methodology and principles and contrary to established evidentiary rules and case law.

The City requests the Court to remand this case to the Special Court of Eminent Domain to determine a reasonable rate of interest to be awarded the City on the excess payment to Dedeaux and for a new trial regarding the amount of just compensation to which Dedeaux is entitled.

Respectfully submitted this the 7th day of June, 2010.

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CERTIFICATE OF SERVICE

I, Gary White, do hereby certify that I have this day delivered, by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellee to the following:

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