

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BOARD OF COUNTY ROAD  
COMMISSIONERS OF THE COUNTY OF  
WASHTENAW,

UNPUBLISHED  
July 9, 1999

Plaintiff- Appellee,

v

No. 203942  
Washtenaw Circuit Court  
LC No. 95-004589 CC

ROBERT J. RAYER, Trustee of the ROBERT  
RAYER TRUST and MARILYN L. RAYER, Trustee  
of the MARILYN L. RAYER TRUST,

Defendants- Appellants.

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Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

In this condemnation action, defendants appeal as of right from an order denying their motion for attorney's fees. We affirm.

Defendants owned and operated a garden center on Jackson Road in the City of Ann Arbor. When plaintiff indicated in 1993 that it would seek to acquire defendants' property for the purposes of reconstructing, widening and improving Jackson Road, defendants retained counsel to represent them. In March, 1994, plaintiff offered to purchase the parcel of land upon which defendants' business operated for \$105,000. After the property was reappraised in January, 1995, plaintiff offered to purchase the land for \$108,000. In addition, plaintiff offered to purchase defendants' movable fixtures and equipment for \$125,660. With respect to inventory, plaintiff did not offer a sum certain but indicated in its offer that it would be bound by the appraisal of a licensed inventory appraiser. Plaintiff's offer contemplated that the inventory appraisal would transpire two days prior to the closing. After defendants informed plaintiff that the foregoing offer did not include the value of immovable fixtures, the offer was amended to include the additional sum of \$13,745 for immovable fixtures.

When defendants failed to accept the amended offer, plaintiff filed a condemnation action to acquire possession of the property. After the complaint was filed, defendants indicated in writing their desire to remain on the property through the summer, peak season for their business, so that they could

sell off some of the inventory. While the issue of just compensation was being litigated, an order for surrender of physical possession was entered which provided that the property would be surrendered to plaintiff on July 1, 1995, however, defendants would be allowed to continue to occupy the premises until August 31, 1995. The order further provided that the appraisal of the inventory would be conducted within forty-eight hours prior to the date defendants vacated the premises. After both parties accepted the mediation evaluation, a consent judgment was entered wherein defendants were awarded the following sums: \$150,000 for the value of the real estate; \$132,305 for movable and immovable trade fixtures; and \$78,355 for inventory.

Subsequent to the entry of the consent judgment, defendants moved for attorney fees. The parties stipulated to an attorney fee relative to the acquisition of the real estate. Thus, the only issue that remained was whether defendants were entitled to attorney's fees relative to the acquisition of the inventory and immovable fixtures. The trial court denied defendants' motion for attorney's fees with respect to the inventory and immovable fixtures and this appeal ensued.

The Uniform Condemnation Procedures Act, MCL 213.51 *et seq.*; MSA 8.265(1) *et seq.*, governs condemnation proceedings and specifically provides for the awarding of attorney's fees under certain circumstances. Because the awarding of attorney's fees is inextricably intertwined with the pre-filing offer, provisions addressing both subjects must be reviewed.

MCL 213.55(1); MSA 8.265(5)(1), which governs the good faith offer to purchase, provides:

Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established. . . . The amount shall not be less than the agency's appraisal of just compensation for the property. . . . If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. . . .

Attorney's fees are provided for in MCL 213.66(3); MSA 8.265(16)(3):

If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court shall order reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The reasonableness of the owner's attorney fees shall be determined by the court. . . .

The trial court ruled that because the amount finally determined to be just compensation for the inventory and immovable fixtures did not exceed the amount of the pre-filing good faith written offer, defendants were not entitled to an attorney's fee relative to the acquisition of the inventory and immovable fixtures. We agree.

With respect to the inventory, defendants argue that because the pre-filing offer did not state a sum certain, but instead provided that plaintiff would be bound by the determination of the value by a licensed inventory appraiser at some time in the future, plaintiff's pre-filing offer was the equivalent of offering zero for the inventory. Defendants then reason that because the final award of \$78,355 exceed the pre-filing offer of zero, they were entitled to an attorney's fee. We disagree.

Based on the plain language of MCL 213.66(3); MSA 8.265(16)(3), an owner is entitled to attorney's fees if the final award exceeds the pre-filing offer. Therefore, if both amounts are determinable, a trial court can determine whether an owner is entitled to reimbursement of its attorney's fees. Although the pre-filing offer did not contain a sum certain for the inventory, plaintiff bound itself to the determination made by the licensed inventory appraiser. In fact, had the appraisal of the inventory been taken before the filing of the complaint, plaintiff would have been statutorily bound to offer an amount at least equal to that appraisal. MCL 213.55; MSA 8.265(5). After defendants ceased operation, the inventory was appraised at the sum of \$78,355. Defendants did not object to this sum, and in fact, this was the final award for the inventory. For all practical purposes, the sum "offered" before the filing of the complaint was \$78,355. Since this sum was equal to the final award, defendants were not entitled to reimbursement of their attorney's fees.

When the amount of attorney's fees is in dispute, each case must be reviewed in light of its own particular facts. *In re Condemnation of Private Property v Curis*, 221 Mich App 136, 139; 561 NW2d 459 (1997). In this case, the facts are unique. Because, at the time of the pre-filing offer, defendants' business was still operational, the just compensation for the taking of the inventory would have been in a constant state of flux. This is true because the property actually being acquired through the taking would be changing. Defendants' occupation of the premises through the summer months added to the uncertainty regarding the value of the inventory. Thus, we find that plaintiff's pre-filing offer to be bound by the appraisal of a licensed inventory appraiser was an offer for purposes of the UCPA.

Next, defendants contend that the trial court erred when it denied reimbursement of attorney's fees with respect to the immovable fixtures. We disagree. It is undisputed that plaintiff's initial offer did not include an offer of just compensation for the immovable fixtures. It also is undisputed that defendants promptly brought this to plaintiff's attention and plaintiff, very shortly thereafter, amended its offer to include compensation (\$13,745) for immovable fixtures. The figure used for the offer was derived from an appraisal done three months before the good faith offer and amended offer were made in April, 1995. Defendants contend that the trial court had discretion to determine whether to use the first offer or the amended offer when reviewing defendants' entitlement to attorney's fees. They then argue that the court abused its discretion when it used the amended offer, which included an additional \$13,745, and concluded that defendants were not entitled to an attorney's fee. We disagree.

Under the facts of this case, which pre-filing offer to use was not within the trial court's discretion. Pursuant to MCL 213.55(3); MSA 8.265(5)(3), if an owner believes that the good faith written offer did not include or fully include one or more items of compensable property or damage for which the owner intends to claim a right to just compensation, the owner *shall* file a written claim with the agency. Although there is no indication that defendants' objections were in writing, defendants

clearly brought to plaintiff's attention the fact that the immovable fixtures were not included in the offer despite the fact that they were appraised by plaintiff's appraiser.

MCL 213.55(3); MSA 8.265(5)(3) further provides that after an agency receives such a claim, it "may provide written notice that it contests the compensability of the claim, establish an amount that it believes to be just compensation for the item of property or damage, or reject the claim." In this case, plaintiff promptly amended its offer to include the additional sum.

The statute then addresses the implications of an amended offer to the awarding of attorney's fees:

If the agency establishes an amount it believes to be just compensation for the item of property or damage, the agency shall submit a good faith written offer for the item of property or damage. The sum of the good faith written offer for all such items or damage plus the original good faith written offer constitutes the good faith written offer for purposes of determining the maximum reimbursable attorney fees under section 16. If an owner fails to file a timely written claim under this subsection, the claim is barred. [MCL 213.55(3); MSA 8.265(5)(3).]

The trial court's finding that the amended good faith offer should be used for determining the entitlement to attorney's fees was required by the statute. Further, because the amended offer contained the additional sum of \$13,745, and this amount was the ultimate award for the immovable fixtures, defendants were not entitled to an award of attorney's fees relative to the acquisition of the immovable fixtures.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff