NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6220-07T3

TOWN OF KEARNY,

Plaintiff-Respondent,

v.

DISCOUNT CITY OF OLD BRIDGE, INC., SPARTECH POLYCOM, FRANKLIN PLASTICS, CORP.,[1]

Defendants,

and

DVL KEARNY HOLDINGS, L.L.C.,

Defendant-Respondent,

and

JAMES FARM MARKET CORP. and JAMES WHOLESALE WAREHOUSE, INC.,

Defendants-Appellants.

Argued September 21, 2009 - Decided October 23, 2009

Before Judges Rodríguez, Reisner and Chambers.

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[1] Counsel advised us that Franklin-Burlington Plastics, Inc. d/b/a Spartech Polycom is one entity, mis-named in the complaint as two separate entities, Spartech Polycom and Franklin Plastics, Corp.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, L-2349-08.

Edward Sun Kiel argued the cause for appellants (Cole, Schotz, Meisel, Forman & Leonard, P.A., attorneys; Mr. Kiel, of counsel and on the brief; Peter E. Lembesis, on the brief).

Gregory J. Castano, Jr. argued the cause for respondent Town of Kearny (Castano Quigley, L.L.C., attorneys; Mr. Castano, on the brief).

L. Stephen Pastor argued the cause for respondent DVL Kearny Holdings, L.L.C., (Hill Wallack, L.L.P., attorneys; James G. O'Donohue, of counsel and on the brief; Megan McGeehin Schwartz, on the brief).

PER CURIAM

Defendants James Farm Market Corp. and James Wholesale Warehouse, Inc. (collectively, James or defendants) appeal from two trial court orders dated July 29, 2008 authorizing the Town of Kearny to proceed with condemnation, terminating James's tenancy, and denying James's motion to dismiss the condemnation complaint. We remand this matter to the trial court for further proceedings consistent with this opinion.

I

This case concerns James's leasehold interests in a parcel owned by defendant DVL Kearny Holdings, L.L.C. (DVL), known as the "Del Toch property." On July 21, 1994, DVL and James entered into a lease agreement for space at the Del Toch

property (the Market Lease). On March 31, 1995, DVL and James entered into a lease agreement for a second space at the Del Toch property (the Warehouse Lease).

Both the Market Lease and the Warehouse Lease contain identical "condemnation" clauses:

> If the Complex of which the Premises are a part, or any portion thereof, shall be taken under eminent domain or condemnation proceedings, or if suit or other action shall be instituted for the taking or condemnation, or if in lieu of any formal condemnation proceedings or actions, Landlord shall grant an option to purchase and or shall sell and convey the Premises or any portion thereof, to the governmental or other public authority, agency, body of public utility, seeking to take said land or any portion thereof, then this lease, at the option of the Landlord, shall terminate, and the term hereof shall end as of such date as Landlord shall fix by notice in writing; and Tenant shall have no claim or be entitled to any portion of any amount which may be awarded as damages or paid as the result of such condemnation proceedings or paid as the purchase price for such option, sale, or conveyance in lieu of formal condemnation proceedings; and all rights of the Tenant to damages, if any, are hereby assigned to the Landlord. The tenant agrees to execute and deliver any instruments, at the expense of the Landlord, as may be deemed necessary or required to expedite any condemnation proceedings or to effectuate a proper transfer of title to such public authority, seeking to take or acquire the Premises, or any portion thereof. Tenant covenants and agrees to vacate the Premises, remove all the Tenant's personal property and deliver up peaceable possession thereof to Landlord, or to such other party designated by

> Landlord in the aforementioned notice. Failure by Tenant to comply with any provisions in this clause shall subject Tenant to such costs, expenses, damages and losses as Landlord may incur by reason of Tenant's breach hereof.
> [(emphasis added)]

In an effort to revive its waterfront area, in 2001 the Town of Kearny adopted the "Passaic Avenue Redevelopment Plan," of which the Del Toch property was the "centerpiece." The plan sought, among other things, "[t]o achieve the vision of Passaic Avenue as a vibrant, mixed-use, waterfront entertainment destination," and anticipated that the "high buildings and funky architecture" of the Del Toch area will "lend[] itself to adaptive reuse" as loft spaces and night clubs. Through an agreement dated December 11, 2007, Kearny appointed DVL as the redeveloper, pursuant to N.J.S.A. 40A:12A-8(f).

Section 2.02 of the Redeveloper Agreement provided that Kearny would use its eminent domain powers to acquire property needed to allow DVL to complete the redevelopment:

> With regard to the Del Toch Parcels, Redeveloper is requesting that the Town use its eminent domain powers, at the sole cost and expense of the Redeveloper, to acquire the property interests identified on the attached Exhibit E. The Town agrees to use reasonable efforts, at the cost and expense of the Redeveloper, to acquire these interests.

Exhibit E of the final Redeveloper Agreement confirmed the various leaseholds that would be acquired by condemnation, along with a fee interest and a "potential implied easement." The paragraph pertaining to the James leases is set forth below.

> Deltock [sic] Leases - James Farm Market, James Farm Wholesale, Discount City. Developer agrees that it will not seek to lease any part of the Project to any tenants whose interests are acquired by eminent domain. Redeveloper shall first be required to use its best efforts to terminate the said leases through negotiation and by making reasonable relocation offers.

However, DVL's fee simple interest in the property was not listed on Exhibit E as one of the interests to be acquired by Kearny.

On May 8, 2008, James filed an order to show cause and verified complaint against DVL and related entities, claiming breach of its lease; breach of the covenant of good faith and fair dealing; and breach of the covenant of quiet enjoyment. James contended that it did not get notice of the planned redevelopment designation, and claimed that DVL's construction plans were inconsistent with the adopted redevelopment plan. On May 12, 2008, Kearny filed a separate verified complaint seeking, among other things, to condemn James's interest in the DVL property.

On July 29, 2008, the trial judge issued a written decision addressing James's affirmative claims and its defenses to the condemnation action. The judge rejected James's argument that Kearny was required to negotiate with defendants before filing the condemnation complaint. He held that the Eminent Domain Act only required negotiation with condemnees "holding the title of record to the property being condemned," pursuant to N.J.S.A. 20:3-6. The judge also relied upon City of Atlantic City v. Cynwyd Investments, 148 N.J. 55 (1997), for the proposition that Kearny was not required to negotiate with a leaseholder before filing a condemnation complaint.

Next, the judge rejected James's argument that the condemnation action should be dismissed because they were not provided "notice of the redevelopment designation proceedings." Citing Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 370 (App. Div. 2008), the judge determined that such notice was only due to a "property owner." Finally, the judge rejected defendants' claim that DVL breached the covenant of good faith and fair dealing, as well as the covenant of quiet enjoyment, in "acting as both a landlord and redeveloper." The judge relied on the condemnation clauses of the leases in rejecting these claims, construing them as James's agreement "to termination of the leases upon condemnation without any compensation due."

II

Our review of the trial judge's legal interpretations is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

On this appeal, James contends that the municipality lacks statutory authority to condemn a tenant's leasehold interest separate from the landlord's fee interest.[2] We disagree. The town has the authority to condemn a tenant's leasehold, as a property interest separate and apart from the landlord's fee ownership of the land. See County of Sussex v. Merrill Lynch Pierce Fenner & Smith, Inc., 351 N.J. Super. 66, 68-69 (Law Div. 2001), aff'd o.b., 351 N.J. Super. 1 (App. Div. 2002); N.J.S.A. 20:3-2(d) (Eminent Domain Act defines "property" as "land, or any interest in land"); N.J.S.A. 20:3-20 (if condemnation complaint lists a "lesser title" than a fee interest, that "lesser title" "shall be the title condemned and acquired").

Article VIII, Section 3, Paragraph 1 of the New Jersey Constitution provides that "[t]he clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken

[2] The transcript of the oral argument before the trial court reveals that James raised this issue before the trial judge, although it was interwoven with the issue of defendants' right to notification of the blight designation.

or acquired." Accordingly, the Local Redevelopment and Housing Law (LRHL), N.J.S.A. 40A:12A-1 to -73, provides that municipalities may acquire "any land or building" by condemnation for this purpose. N.J.S.A. 40A:12A-8(c). Further, the LRHL empowers a municipality to "[d]o all things necessary or convenient to carry out its powers." See Vineland Constr. Co., Inc. v. Twp. of Pennsauken, 395 N.J. Super. 230, 252 (App. Div. 2007) (recognizing subsection 8(n) as a "broad grant of authority [that] includes the power to acquire, by condemnation, any property 'necessary for the redevelopment project,' N.J.S.A. 40A:12A-8c . . . ." (emphasis added)), appeal dismissed as moot, 195 N.J. 513 (2008).

We cannot agree with James's argument that the phrase "land or buildings" in N.J.S.A. 40A:12A-8(c) limits a municipality to acquiring a fee simple interest in those properties. Nothing in the history of the LRHL suggests that the Legislature intended to preclude a municipality from condemning less than a fee simple interest if necessary to carry out a redevelopment plan. Such a cramped construction of the LRHL could prevent a municipality from condemning an easement or any other less-than-fee interest it might need to acquire in furtherance of a redevelopment plan. James's arguments on this issue are without

sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

James argues in the alternative that, where the town is only condemning the leasehold interest and not the fee interest, the town has a statutory obligation under N.J.S.A. 20:3-6 to negotiate with the tenant before commencing the condemnation action. However, N.J.S.A. 20:3-6, by its terms, only requires the condemnor to negotiate with "the condemnee who holds title of record." Ibid. In City of Atlantic City v. Cynwyd Investments, 148 N.J. 55, 69 (1997), the Supreme Court rejected a tenant's argument that it had a separate right to pre-condemnation negotiation. In that case, both the landlord's fee interest and the tenant's ninety-nine year lease were being condemned.

We need not decide here whether Cynwyd is distinguishable, because the redevelopment agreement required DVL to "use its best efforts to terminate the said leases through negotiation and by making reasonable relocation offers" prior to any condemnation action. There is no dispute that DVL, whose funds will pay for all costs of condemnation, attempted to negotiate with James before Kearny filed the condemnation complaint. We conclude that, in this case, that was sufficient, and there is

no reason to believe that Kearny would be more successful if it conducted separate negotiations.

We next address James's effort to challenge the blight designation. Following our holding in Iron Mountain Information Management, Inc. v. City of Newark, 405 N.J. Super. 599, 604 (App. Div. 2009), certif. granted, 199 N.J. 517 (2009), we conclude that a tenant has no right to individual notice of a proposed blight designation. This is consistent with the language of the statute, which only provides for notice to the owners of "parcel[s] of property" and persons noted on the tax assessment rolls as having an interest in the parcels:

> A copy of the notice shall be mailed at least ten days prior to the date set for the hearing to the last owner, if any, of each parcel of property within the area according to the assessment records of the municipality. A notice shall also be sent to all persons at their last known address, if any, whose names are noted on the assessment records as claimants of an interest in any such parcel.
>
> [N.J.S.A. 40A:12A-6(b)(3)(emphasis added).]

From that conclusion it follows that a tenant is bound by the ordinary forty-five day time limit to challenge a blight designation, see R. 4:69-6 and N.J.S.A. 40A:12A-6b(7), and cannot avail itself of an extension of that time limit premised on the town's failure to have provided the tenant, years ago, with individual notice of the proposed designation. See

Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 412-13 (App. Div. 2008) (Absent contemporaneous notice of the redevelopment designation, a property owner retains the right to challenge the blight designation in a later condemnation action). Therefore, James is not entitled to challenge the 2001 blight designation in the context of this condemnation case, because such a challenge would be untimely.[3]

On the other hand, we perceive no bar to the tenant raising the very different issue of whether the landlord/redeveloper's proposed project is consistent with the redevelopment plan. Clearly, if the redeveloper intends to evict its tenants in order to build something at variance with the redevelopment plan, the landlord is manipulating the redevelopment process, and violating the redevelopment statute. See N.J.S.A. 40A:12A-9 (redeveloper must agree to "construct only the uses established in the current redevelopment plan"). We express no view on the merits of defendants' claim, beyond deciding that James has a right to raise the issue. The trial court did not specifically address that claim, and shall address the issue on remand.

Finally, James has not appealed from the trial judge's dismissal of its claim that DVL breached its obligation of good

[3] As a tenant, James would have standing to challenge a blight designation. See N.J.S.A. 40A:12A-6b(4). However, it would still be required to raise such a challenge in a timely manner.

faith and fair dealing under the lease. Nor have the parties briefed that issue. Thus, that issue is waived. However, both parties have, to some extent, briefed the question of James's right to just compensation for the condemnation of its lease.

DVL contends that the "condemnation clause" of the lease (paragraph 12) precludes James's right to compensation. James contends that the clause was intended to apply only when the land or portions of the land (as opposed to "interests in" the land short of a fee interest) are condemned. James argues that the condemnation clause was drafted to avoid the need to allocate the condemnation proceeds between the landlord and the tenant, in the event the landlord's property was condemned. See Cynwyd, supra, 148 N.J. at 70-71 (discussing the allocation process); Twp. of Bloomfield v. Rosanna's Figure Salon, Inc., 253 N.J. Super. 551, 560 (App. Div. 1992) ("[T]he evident purpose of the condemnation clause of the lease at issue in this case [was] to maximize the landlord's compensation in the event of a public taking of the property.").

James contends that in this case, the "condemnation clause" of the lease does not preclude the tenant's right to just compensation, because the town is not condemning the landlord's property. Rather, the landlord avoided condemnation of its property interest by having itself designated as the

redeveloper. If James is correct, it has the right to pursue just compensation in the condemnation proceedings. See Merrill Lynch, supra, 351 N.J. Super. at 70. However, the trial court did not focus on this question, and the parties have not adequately briefed it. We therefore also remand to the trial court for further consideration the question of James's right to just compensation, in addition to relocation expenses.

Affirmed in part, reversed in part, and remanded.