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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

COUNCIL OF SAN BENITO COUNTY
GOVERNMENTS,

Plaintiffs and Respondents,

v.

CHARLES F. MCNAMEE, as Trustee,
etc., et al.,

Defendants and Appellants.

H033989

(San Benito County
Super. Ct. No. CU0600048)

Defendants challenge the trial court's decision in this eminent domain action that they were not entitled to severance damages because they had failed to show a "substantial impairment of access to their remainder parcel." They claim that the undisputed evidence established substantial impairment. We conclude that the trial court did not err in ruling that defendants' access to their remainder parcel was not substantially impaired by the taking.

I. Facts¹

“Defendants own a 3.27[-]acre rectangular parcel with 712.67 feet of frontage on the eastside of San Felipe Road. The south end of the parcel is improved with a small building and a fenced used car lot. The rest of the parcel is used for row crop cultivation. Both are short-term interim uses pending commercial development.” Plaintiff initiated this eminent domain proceeding to acquire a narrow, triangular-shaped slice of land (the take) from the northwest corner of defendants’ parcel “to accommodate the relocation of Highway 25 and for the intersection” between Highway 25 and San Felipe Road. The take is 1,494 square feet and eliminates 175.01 feet of the parcel’s frontage on San Felipe Road. After the taking, the parcel will have 537.66 feet of frontage on San Felipe Road.

II. Procedural Background

Plaintiff initially moved in limine to bifurcate the court trial on the issue of entitlement to severance damages from the jury trial on the issue of compensation. Defendants filed opposition to plaintiff’s bifurcation motion in which they contended that the taking would result in “substantial impairment” of access to the remaining parcel thereby entitling defendants to severance damages. This was the sole basis upon which defendants sought severance damages.

Plaintiff also filed an in limine motion seeking either to exclude all evidence of severance damages or to have an Evidence Code section 402 hearing on whether the interference with access was “substantial” as required in order to obtain severance damages. Plaintiff’s motion was accompanied by five exhibits. Three of the five exhibits were diagrams showing the parcel, the surroundings roads and parcels, and specifying the portion of the parcel that was being taken. The fourth exhibit was an excerpt of

¹ Because the appellate record does not contain a reporter’s transcript of the evidentiary hearing, these facts are taken from the trial court’s statement of decision.

deposition testimony by defendants' expert Stephen Gettel. The final exhibit was a portion of an appraisal report (apparently written by Gettel) on the property. The appraisal report stated that the severance damages were \$84,132. The appellate record does not contain any opposition to this motion. Plaintiff filed another motion in limine seeking "a ruling that, as a matter of law, the subject property owned by [defendants] will not suffer a substantial impairment of access as a result of [the taking]."

On August 25, 2008, the trial court held a hearing on the in limine motions. The court initially reserved ruling on the motion to exclude evidence of severance damages and continued the matter to the following day for an Evidence Code section 402 hearing. The August 25 hearing was not reported.²

On August 26, 2008, the court held an Evidence Code section 402 hearing. This hearing too was not reported.³ From the clerk's minutes, we can discern that two witnesses testified at the hearing. Mary Diken testified for plaintiff, and James Francis McNamee testified for defendants. The exhibits admitted into evidence at the hearing were two aerial views of the parcel, a vicinity map, and some materials regarding site criteria for various fast food restaurants and gas stations.⁴ The parties did not object to the trial court considering "the written evidence submitted by both sides" with their pleadings as "part of the record."

² The minutes of the hearing stated: "Reporter: none."

³ The minutes of the hearing stated: "Reporter: no reporter." In the trial court's written ruling rejecting defendants' objections to the proposed statement of decision, the court stated: "If defendants wanted a perfectly accurate record, they should have hired a reporter!"

⁴ The trial court's written ruling on defendants' objections to the proposed statement of decision reveals that McNamee "testified extensively and in detail concerning his computer searches regarding the suitability of the northern one acre for a high traffic user such as a service station, mini-mart, and/or a fast food restaurant, etc." The court concluded: "Speculation by Mr. McNamee as to the desirability of the northern acre for uses of the sort in question is no proof of anything."

After hearing testimony and entertaining argument, the court concluded that defendants had failed to show that there was substantial impairment. The parties stipulated to the value of the take, and the court found that defendants were entitled to \$16,494 plus interest and costs for the taking. Plaintiff's counsel was directed to prepare a statement of decision.

Plaintiff's counsel prepared a nine-page proposed statement of decision. Defendants filed objections to the proposed statement of decision. The trial court overruled the objections and signed the proposed statement of decision. In the statement of decision, the trial court explicitly found that "defendants have failed to show a substantial impairment of access to their remainder parcel." Judgment was entered in January 2009, and defendants appealed.

III. Analysis

Defendants contend on appeal that the trial court erred in rejecting their claim that the taking of their property created a "substantial impairment" of access to the remainder parcel. They claim that the trial court's statement of decision "demonstrates its failure to analyze correctly the issues and evidence in this case" and "shows that the trial court failed to consider the facts of this case."

The record on appeal in this case consists solely of the clerk's transcript. The Evidence Code section 402 hearing on the substantial impairment issue, at which two witnesses testified, was not reported, and we have no record of the testimonial evidence that was presented to the trial court at that hearing. "In a judgment roll appeal based on a clerk's transcript, every presumption is in favor of the validity of the judgment and all facts consistent with its validity will be presumed to have existed. The sufficiency of the evidence is not open to review. The trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding on the appellate court, unless reversible error appears on the record." (*Bond v. Pulsar Video Productions*

(1996) 50 Cal.App.4th 918, 924; *Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 454.)

Consequently, defendants are precluded from challenging the sufficiency of the evidence to support the trial court's findings, and we must presume the existence of every fact necessary to the validity of the court's judgment. Defendants can succeed on appeal only if the trial court's statement of decision itself demonstrates that it committed reversible error.

Under these circumstances, it is not necessary for us to definitely resolve the disputed question of the appropriate standard of review. Over the years, there has been disagreement about whether a trial court's resolution of the "substantial impairment" issue is subject to substantial evidence review, de novo review, or a mixed standard. (See *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1554 [mixed standard of review]; *Perrin v. Los Angeles County Transportation Com.* (1996) 42 Cal.App.4th 1807, 1812 [substantial evidence standard of review]; *San Diego Metropolitan Transit Development Bd. v. Price Co.* (1995) 37 Cal.App.4th 1541, 1547-1548 [cataloging conflicting cases and applying substantial evidence standard of review]; *Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738, 1745 [predominantly question of law].) Because we are required in this case to presume that the trial court's decision was supported by substantial evidence, and we are reviewing the court's statement of decision solely to determine whether it establishes that the trial court erred as a matter of law, we apply a de novo standard to this limited question.

"Not every interference with the property owner's access to the street upon which his property abuts and not every impairment of access, as such, to the general system of public streets constitutes a taking which entitles him to compensation. Such compensation must rest upon the property owner's showing of a *substantial impairment* of his right of access to the general system of public streets. [¶] The determination of

whether such substantial impairment has been established must be reached as a matter of law. The extent of such impairment must be fixed as a matter of fact. The cases have consistently held that the trial court must rule, as a matter of law, whether the interference with access constitutes a substantial or unreasonable impairment.” (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663-664 (*Breidert*).) “This is but another way of saying that the trial court and not the jury must decide whether in the particular case there will be an actionable interference with the defendants’ right of access.” (*People v. Ricciardi* (1943) 23 Cal.2d 390, 403.) “Substantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.” (*Breidert*, at p. 664.) “Thus, it is patent that the issue of substantial impairment is a fact-based inquiry.” (*Perrin v. Los Angeles County Transportation Com.*, *supra*, 42 Cal.App.4th at p. 1812.)

Defendants challenge the trial court’s rejection of McNamee’s testimony at the Evidence Code section 402 hearing. They argue that the court’s explanation in its statement of decision for its rejection of McNamee’s testimony “demonstrates its failure to analyze correctly the issues and evidence in this case.” In the absence of any record of McNamee’s testimony, we must presume that the trial court had a valid basis for discrediting it as “speculation.”

Defendants maintain that the trial court erred in focusing on the remaining access to the remainder parcel rather than on how much of the parcel’s original access had been eliminated. No legal error occurred. The question before the trial court was whether access to the remainder parcel was *substantially impaired*, not whether the parcel’s original access had been reduced by the taking. Substantially impaired does not mean the same as reduced. The relevant meaning of “substantial” is “essential.” (Merriam-Webster’s Collegiate Dict. (10th ed. 1999) p. 1174.) “Impaired” has a qualitative import and means “handicapped or functionally defective,” while “reduce” is merely quantitative and simply means “diminish in size.” (Merriam-Webster’s Collegiate Dict. (10th ed.

1999) pp. 581, 980) Thus, even a taking that significantly *reduces* the access to a parcel may not result in a substantial impairment of the remainder parcel's access if the remaining access is not functionally defective. (Cf. *San Diego Metropolitan Transit Development Bd. v. Price Co.*, *supra*, 37 Cal.App.4th at pp. 1547-1548 [court must examine "effect" of access reduction].) The trial court properly focused on the *functionality* of the remaining access to the remainder parcel rather than on the quantitative reduction of access.

Defendants claim legal error in the omission of certain evidence from the statement of decision. All presumptions are in favor of the judgment. The trial court was entitled to reject defendants' evidence or attach little weight to it. Any omissions of evidence from the statement of decision must be presumed to reflect the trial court's rejection of such evidence or its conclusion that little weight could be according such evidence. The trial court was not obligated to credit any of the evidence that defendants rely upon to support their claim that access was substantially impaired.

Defendants present a series of arguments in which they assert that certain facts or particular cases do not demonstrate that there "Is Not Substantial Impairment." Since we must *presume* that the trial court's judgment is supported by the facts and the law, the question before us is not whether particular facts or cases provide such support but whether defendants have rebutted this presumption by demonstrating that the facts and the law compel the opposite conclusion.

While criticizing the trial court for relying on cases to support its fact-based decision, defendants contend that *People v. Loop* (1954) 127 Cal.App.2d 786 (*Loop*) "Is Authority that the Taking . . . Is a Substantial Impairment" of access to the remainder parcel. In *Loop*, the defendants owned two parcels with a frontage of 122.66 feet on Wilshire Boulevard in Los Angeles. The taking reduced the remainder parcel's frontage on Wilshire Boulevard to 76.03 feet. (*Loop*, at p. 789.) The defense experts testified that the highest and best use of the property was as a multi-story garage. (*Loop*, at p. 791.)

They also opined that the remainder parcel would be less valuable due to, among other things, “the impairment of use of the property as a functioning unit.” (*Loop*, at p. 799.) The Court of Appeal stated: “The evidence is without conflict that defendants’ right of ingress and egress to and from Wilshire Boulevard and their easement of reasonable view will be substantially impaired by the taking” (*Loop*, at p. 804.)

Loop does not compel a conclusion that the trial court erred in rejecting defendants’ substantial impairment claim. As defendants recognize, it is a “fact-based inquiry” whether a particular taking will substantially impair access to the remainder parcel. In *Loop*, the facts established that the taking would result in such limited access to the remainder parcel, just 76.03 feet of frontage, that the *functionality* of the parcel for use as a multi-story parking garage, which the owner’s expert testified was the parcel’s highest and best use, would be hampered.

Here, while it was undisputed that the highest and best use of the parcel was commercial development, the trial court *rejected* defendants’ claim, based on their expert’s deposition testimony, that “the highest and best use of the property is for a commercial development by a *high traffic user*.”⁵ (Italics added.) Hence, the highest and best use in *Loop*, a parking garage, was far more access dependent than any of the commercial uses suggested by the evidence that the trial court credited here.

In *Loop*, access to the remainder parcel was reduced to just 76.03 feet, while here defendants’ remainder parcel will still have over 500 feet of accessible frontage. Indeed, defendants’ expert *conceded* that the taking here would, at most, eliminate the potential

⁵ Defendants claim that the trial court’s finding was not supported by “a scintilla of evidence.” However, this challenge to the sufficiency of the evidence to support the trial court’s finding is precluded by the fact that this is a judgment roll appeal in which we have no record of the evidence that was before the trial court at the evidentiary hearing. (*Delanoy v. Delanoy* (1932) 216 Cal. 23, 26-27 [“When an appeal is perfected on the judgment-roll alone we must assume that all of the findings of the lower court are amply sustained by the evidence.”].)

for a *fifth* driveway to the remainder parcel, while still allowing for *at least four* driveways to the remainder parcel. The minimal level of remaining frontage in *Loop* is in sharp contrast with the high level of access that will remain here after the taking.

Finally, the evidence in *Loop* showed that the access restriction limited the *functionality* of the remainder parcel for its highest and best use, while the trial court here did not credit any similar evidence.

Severance damages are not available simply because access to the remainder parcel will be *reduced* by the taking. Substantial impairment is shown only where access to the remainder parcel will be rendered functionally defective. The trial court did not err in concluding that access to the remainder parcel will not be substantially impaired by the taking.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

McAdams, J.