IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

WEW, Ltd. and Henry and Jacqueline Willis,	)	December Term, 2004
Plaintiffs / Movants	)	
v.	)	No. 2036
Southeastern Pennsylvania Transportation Authority,	)	COMMERCE PROGRAM
Defendant / Respondent	)	Motion Control No.053086

ORDER

AND NOW, this 12th day of September, 2006, upon consideration of the motion for the appointment of a board of viewers by Plaintiffs WEW, Ltd. and Henry and Jacqueline Willis, the preliminary objections thereto filed by Plaintiff Southeastern Pennsylvania Transportation Authority, the respective memoranda of law in support and opposition, and all other matters of record, it is ORDERED that:

1. Defendant's preliminary objection is SUSTAINED and Plaintiffs' motion for the appointment of a board of viewers is DISMISSED.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

Plaintiffs, WEW Ltd. ("WEW") and Henry and Jacqueline Willis, (the "Willises") initiated *de facto* condemnation proceedings by filing a motion for the appointment of a board of viewers. Defendant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), filed preliminary objections to that motion. For the reasons discussed below, SEPTA's preliminary objection is sustained and the motion for the appointment of a board of viewers is dismissed.

BACKGROUND

In 1999, SEPTA began to renovate a section of its Market—Frankford Elevated Train Line between 46th and 63rd Streets. From the onset, SEPTA understood that its activities would impact over two hundred businesses along the line.[1] In 2002, the work reached the 61st block of Market Street where Plaintiffs own real property. To this date,

[1] See Septa's Executive Summary at 2, Exhibit A to Plaintiffs' motion for the appointment of a board of viewers.

work continues along this block despite projections that SEPTA would clear the area at some point in 2005.

WEW Ltd. purchased several properties along the 61st block of Market Street, in 1998-99, after SEPTA announced its plans to renovate that section of the Market—Frankford Line. Although WEW planned to develop these properties into commercial and residential facilities, the premises remain to this day undeveloped and vacant. Mr. Edward West, the sole shareholder, officer and employee of WEW, indicates that this corporation paid $240,000 for the properties.[2] He further asserts that SEPTA's delays in the renovation have prevented him from obtaining the financing needed to develop his plans. In essence, he contends that no bank will have faith in his ability to find tenants while SEPTA's crews, machinery, fencing, and debris, continue to restrict access to his property.[3] He also submits SEPTA's work plans to show that the pertinent section of Market Street was completely blocked, 24 hours per day, seven days per week, between January 20, 2003 and March 27, 2003.[4] Mr. West also asserts that WEW earns no income, that this company has been posting losses since 2000, and that he has been personally paying all the expenses required to keep the properties solvent, insured, and in compliance.[5]

Mr. and Mrs. Willis, owners of a property also on the 61st block of Market Street, have been operating a paper goods business on their premises since 1972. In addition to this business, the Willises keep a Contract Postal Unit and a public notary service in the same facility. Mr. Willis indicates that one-hundred percent of his business relies on

[2] Exhibit L to Plaintiffs' motion for the appointment of a board of viewers at 5:14.
[3] Motion for the appointment of a board of viewers, ¶ 70.
[4] Exhibit K to Plaintiffs' motion for the appointment of a board of viewers.
[5] Motion for the appointment of a board of viewers, ¶ 84.

customer walk-ins.[6] In addition Mr. Willis states that his business has been unable to receive deliveries, for at least six months beginning in November 2005, as a result of the interference caused by SEPTA's ongoing work.[7] Furthermore, Mr. Willis asserts in his motion that SEPTA's activities caused a power surge which resulted in an interruption of the electrical service, and in damage to his electronic equipment.[8] He also avers that the uncertainty surrounding the end of SEPTA's renovation work has forced him to set aside plans to install an ATM machine on the premises, as well as to open a cyber café and bookstore.[9] He adds that SEPTA's interference has caused his $10,000 investment in the Contract Postal Service to yield less than $1,000 in gross revenues since July 2005, even though he expected to generate gross revenues of up to $150,000 per year on that investment.[10]

DISCUSSION

I. WEW's Claim is Based on Doubtful, Speculative and Conjectural Premises

At the onset, the court notes that when a plaintiff petitions for the appointment of a board of viewers, the trial court must first rule on the preliminary question of whether the *de facto* taking has occurred.[11] If the court finds that there has been a *de facto* taking, then it sends the case to a board of viewers.[12] "Preliminary objections are the proper response to a petition for the appointment of viewers pursuant to …" 26 P.S. § 504 of the Eminent Domain Code.[13] If the preliminary objections raise factual issues whose

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[6] Exhibit V to Plaintiffs' motion for the appointment of a board of viewers at 6:19.
[7] Id. at 8:28.
[8] Motion for the appointment of a board of viewers, ¶ 102.
[9] Id. at ¶126.
[10] Id. at ¶¶ 123-25.
[11] Millcreek Township v. N.E.A. Cross Company, 152 Pa. Commw. 576, 620 A.2d 558, 561 (1993) rearg. denied.
[12] Id.
[13] Id.

resolution will determine whether a *de facto* taking has occurred, then "the court must hold an evidentiary hearing."[14] If the preliminary objections do not raise such factual issues, then the court must simply review the petition and either sustain the preliminary objections if the petition fails to aver sufficiently that a *de facto* taking occurred, or overrule the preliminary objection if the petition avers sufficiently that there was a *de facto* taking.[15]

WEW asserts that the construction delays, the trash accumulations, the obstructive fencing, and the street closures, prevented it from obtaining the financing necessary to develop the properties, and that such interference constituted a *de facto* taking. This court disagrees.

A claim of *de facto* taking, when based on an alleged future or prospective injury, finds no relief in the law of eminent domain. In re: Petition of 1301 Filbert Limited Partnership, 64 Pa. Comm. 605, 441, A.2d 1345, 1360 (1980).

In Filbert, a partnership purchased a vacant and dilapidated hotel with the intention of renovating it before the Bicentennial celebrations of 1976, even though the City of Philadelphia had announced plans to build a tunnel adjacent to the property. Id. at 1347-1348. Although the City informed the partnership that it would appraise the hotel to ascertain its fair value in light of a "possible" condemnation, the local Commissioner informed the partnership that the City would neither purchase the hotel, nor condemn it. Id. at 1349. The partnership, while expending some of its funds to begin renovation, could not secure the financing necessary to complete the project. Id. at 1350. In refusing to lend money to the partnership, the banks expressed their concern that the ongoing

[14] Id.
[15] Id. at 561-62.

public work would so disrupt the hotel's operation as to preclude its future success. Id. Thus the partnership, unable to acquire financing for the plan, alleged a *de facto* taking and petitioned for the appointment of a board of viewers. The trial court determined that no *de facto* taking had occurred. The partnership appealed.

On appeal, the Pennsylvania Commonwealth Court affirmed the trial court's finding. In agreeing that a *de facto* taking had not occurred, the Commonwealth Court analyzed the nature of the impact that the public project exerted on the privately owned property. Id. at 1347. The Court concluded that the claim, being "linked to an alleged injury that [was] not only prospective but … also speculative and conjectural," could not find relief under the law of eminent domain. Id. at 1360.

Here, WEW's allegations appear remarkably similar to the facts in Filbert: first, WEW, before acquiring certain sections of real estate, knew of SEPTA's plans to renovate the path adjacent to the properties in question; second, WEW alleges that the ongoing construction caused its potential financial backers to shy away; and third, WEW argues that it suffered a *de facto* taking because the protracted renovation frustrated its plan to successfully develop the properties into rental units. Based on the similarities between the speculative averments made by WEW, and the speculative averments made by the partnership in Filbert, this court sustains SEPTA's preliminary objection to WEW's petition for a board of viewers, and dismisses WEW's Motion.

II. The Willises Have Not Suffered a Substantial Deprivation

The Willises aver that the trash accumulations, the obstructive fencing, the street closures and the concentration of noises, crews, machinery and construction debris, have

substantially deprived them of the use and enjoyment of their real property, and that SEPTA's conduct constitutes a *de facto* taking. This court disagrees.

"In order for a condemnee to prove that a *de facto* taking has occurred, he must show exceptional circumstances which have substantially deprived him of the use and enjoyment of his property."[16] In addition, no bright line exists "to determine when government action shall be deemed a *de facto* taking; instead, each case before the courts must be examined and decided on its own facts."[17] In assessing on a case-by-case basis whether a petitioner has established a *de facto* taking, the courts examine several factors. If the petitioner shows that the construction prevents reasonable ingress in and egress from the property such that the interference causes the owner's business to close, then there is a *de facto* taking.[18] Conversely, if a petitioner cannot show that the renovation permanently deprived access to the property, that it caused a substantial loss in the income generated by the property, and that it depreciated the fair market value of the property, then no *de facto* taking has occurred.[19] Applying the standards above, the Willises have not shown that they suffered a *de facto* taking: they have not averred that the construction caused a substantial drop in their business income, and have not alleged that their building has been or will be depreciated once the reconstruction is completed. On the contrary, the Willises remain in control of the premises, continue to operate their multiple businesses, and enjoy access to their property, albeit with some burdens.

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[16] Appeal of Jacobs, 55 Pa. Commw. 142, 423 A.2d 442, 443 (1980).
[17] Newman v. Commonwealth of Pennsylvania DOT, 791 A.2d 1287, 1289 (Pa. Commw. 2002).
[18] Id. at 1290.
[19] Berk v. Commonwealth of Pennsylvania, DOT, 168 Pa. Commw. 560, 651 A.2d 195, 198-200 (1994) (reversing the trial court's decision and finding from the record that throughout the reconstruction of a bridge, the property in question had remained tenant-occupied, that gross income never dropped substantially, and that the fair market value of the building had actually increased as a result of the public improvement).

To support their contention that SEPTA's protracted work constitutes a *de* facto taking, the Willises rely on a recent case decided on appeal, Thomas McElwee & Son Inc. v. SEPTA, 896 A.2d 13 (2006). McElwee & Son, Inc., a printing company operating since 1954, lost a substantial portion of its business as a result of the same SEPTA renovation work alleged in the case at hand. Specifically, McElwee endured extremely limited access throughout a three-year construction period, suffered disruption of its walk-in business which comprised 20% of its total activity, lost $60,000 between 1999 and 2000, and, in 2003, closed down as a result of these hardships. Id. at 15-20. In reversing the trial court's decision granting SEPTA's preliminary objection, the Commonwealth Court reasoned that when a public project, though temporary, impacts an economic activity to the point of causing the business to fail, then a *de facto* taking has occurred. Id. at 19 (citing Friedman v. City of Philadelphia, 94 Pa. Commw. 572, 503 A.2d 1110 (1986)).

Here however, reliance on McElwee is inapposite. The Willises, while asserting that their businesses depend exclusively on walk-ins, have not established the crucial point that triggered a *de* facto taking in McElwee –namely, that the interference "caused the business to fail." Unlike the McElwees, the Willises continue to operate their multiple businesses. In other words, the construction interference, while forcing the McElwees out of business and thus depriving them of the use and enjoyment of their property, has not yet imposed the same outcome upon the Willises.[20]

[20] For an example of a *de facto* condemnation without a showing of business failure, see McCracken v. City of Philadelphia, 69 Pa. Commw. 492, 451 A.2d 1046 (1982) (severely curtailing access to a bar and restaurant, dumping six feet of dirt directly in front of the building, damaging the property's structure, preventing regular and transient customers from patronizing the premises, and causing the business to lose so much income as to preclude the owner from repairing, maintaining and insuring the premises, contributed "cumulatively" to deny the owner of the use and enjoyment of his property.) Id. at 1049-1050.

In conclusion, the petition for the appointment of a board of viewers fails to aver sufficiently that either WEW or the Willises have been substantially deprived of the use and enjoyment of their properties. For the reasons explained above, the court sustains SEPTA's preliminary objection and dismisses the Plaintiffs' petition for the appointment of a board of viewers. The court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

MARK I. BERNSTEIN, J.