IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
CLARK COUNTY, OHIO

City of Springfield, Ohio	:	CASE NO. 20104003
Plaintiff	:	
-vs-	:	JUDGE RICHARD P. CAREY
Springfield Venture, LLC, et al.	:	
Defendants	:	ENTRY

This matter came before this Court for hearing pursuant to R.C. §163.18 on the 2nd day of March, 2011. The genesis of this matter begins on June 25, 2010 with the filing of the Petition to Appropriate Interest in Real Property filed by the City of Springfield, Ohio (hereinafter "the City") to take a portion of the real property located at the southwest corner of West North Street and Plum Street in Springfield, Ohio owned by Springfield Venture, LLC. Concurrently with the filing of this Petition, the City deposited with this Court pursuant to R.C. §163.06 the sum of $835,846.00 comprising the estimated amount of damages as determined by the City. Now before this Court are two competing Motions for distribution of this deposit: one by the owner of the property, Springfield Venture, LLC (hereinafter "Springfield Venture"); and the second by Party Defendant, U.S. Bank National Association (hereinafter "U.S. Bank"). Attorneys James Cobb and Thomas Young presented the arguments of these two parties respectively.

Attorneys Andrew Burkholder and Steve Jones appeared in an observatory capacity on behalf of their clients, the City and Rite Aid of Ohio, Inc., respectively.

Some background. The property consists of 1.664 acres on which there is but one building housing Rite Aid Pharmacy, with a number of parking spaces servicing the same. With the posting of the aforementioned deposit, the City of Springfield took possession of the northern portion of this property, consisting of .249 acres which is comprised of approximately eighteen parking spaces, some lighting fixtures, and shrubbery.

Although the City's right to appropriate the property was originally challenged by Springfield Venture, the same has been withdrawn. What remains pending before this Court is the issue of damages as a result of said appropriation. Pursuant to R.C. 163.18, it is now incumbent upon this Court to consider the respective interests of the owners in the property and make distribution of the deposit accordingly.

In December of 1997, the property in question was owned by RX Development, LTD. On December 5, 1997, RX Development entered into a twenty year lease agreement with Party Defendant, Rite Aid of Ohio, Inc. (hereinafter "Rite Aid"). Ownership of the property was subsequently transferred to RX Properties which then executed a mortgage in favor of Conseco Mortgage Capital, Inc. on July 22, 1998 in the amount of $2,430,000.00. On October 30, 1998, RX Properties transferred said property to Party Defendant, Springfield Venture, LLC, which assumed said mortgage.

The holder of the mortgage, too, changed hands several times, to-wit: on July 29, 1998 to Conseco Life Insurance Company; on August 13, 2004 to Regency Savings Bank --- the same being recorded of record on December 7, 2004; Regency Bank then became

known as Park National Bank; Park National Bank apparently entered bankruptcy proceedings and the Federal Deposit Insurance Corporation was appointed as the receiver for Park National Bank. Finally the mortgage was assigned to U.S. Bank on July 15, 2010, stated to be effective October 30, 2009, and recorded on August 20, 2010.

Consequently, as of this date, Springfield Venture is the owner of said property of record. U.S. Bank holds the sole mortgage on the property and so is deemed to be an "owner" pursuant to R.C. §163.01(E). Rite Aid is the sole tenant on the property, currently operating a pharmacy thereon. Only Springfield Venture, as the owner of record, and U.S. Bank, as the lien holder have, filed claims to the deposit herein.

In resolving these competing claims, the parties direct this Court's attention first to whether U.S. Bank still enjoys a viable mortgage on said property; and second, whether the original terms of the mortgage and/or the lease agreement dictate the distribution to be made of the deposit herein.

As to the first issue, the position of Springfield Venture is that the mortgage in question was terminated when a "satisfaction of mortgage" document regarding this mortgage was recorded of record on July 26, 2010, stating that said satisfaction was effective August 24, 2004. Springfield Venture contends that insofar as this satisfaction of mortgage document was recorded prior to the August 20, 2010 recording of the mortgage assignment to U.S. Bank, that this "satisfaction" enjoys "preference" pursuant to R.C. §5301.23 - .25; and U.S. Bank's mortgage thereby would have no legal effect.

However, as U.S. Bank points out, this satisfaction of mortgage was not properly executed by the mortgage holder of record at the time of its execution. A review of the documents reveals that it was executed on the 14th day of July 2010 and, as stated above,

recorded on July 26, 2010, by and for "Conseco Life Insurance Company". However, at that time, Conseco Life Insurance Company was not the holder in due course of said mortgage. As stated above, Conseco Life Insurance Company had already assigned this mortgage to Regency Savings Bank on August 13, 2004. Accordingly, Conseco Life Insurance Company did not have the authority to file any satisfaction of mortgage document which would compromise the rights of a subsequent holder in due course. As such, the satisfaction of mortgage document herein does not enjoy preference over the U.S. Bank mortgage.

Moreover, Springfield Venture concedes that it still owes U.S. Bank the unpaid balance from the original 1998 mortgage. Accordingly, the first issue does not dictate the outcome of the claims for the distribution as between Springfield Venture and U.S. Bank. U.S. Bank holds a valid mortgage on the property for purposes of this hearing.

The second issue demands an interpretation of two legal instruments: the language of the original 1998 mortgage; and the language of the original 1997 lease with Rite Aid. The pertinent language from said mortgage document can be found in clause six of the same which provides the following, to-wit:

> "6. CONDEMNATION. The Mortgagor covenants and agrees that if at any time all of any portion of the Mortgaged Premises shall be taken or damaged under the power of eminent domain the award received by condemnation proceedings for any property so taken, or any payment received in lieu of such condemnation proceedings, shall be paid directly to the Mortgagee and all or any portion of such award or payment, at the option of the Mortgagee, shall be applied to the indebtedness hereby secured or paid over, wholly or in part, to the Mortgagor for the purpose of altering, restoring or rebuilding any part of the Mortgaged Premises which may have been altered, damaged or destroyed as a result of any such taking or damage, or for any other purpose or object satisfactory to Mortgagee; provided, that the Mortgagee shall not be obligated to see to the application of any amount paid over to the Mortgagor.

> As long as RITE AID OF OHIO, INC. is the Tenant and is not in default under the terms of the existing lease, the condemnation proceeds will be used and disbursed in accordance with the terms and provisions of the lease."

The pertinent language of the lease agreement can be found in the first two paragraphs of Article 21 of the same, which provides the following:

> "ARTICLE 21 – Eminent Domain
>
> If by exercise of the right of eminent domain or by conveyance made in response to the threat of the exercise of such right ("Taking"), the entire Property is taken, or so much of the Property is taken that the Property cannot be used by Tenant for the purposes for which it was used immediately before the Taking, then this Lease will end on the earlier of the vesting of title to the Property in the condemning authority or the taking of possession of the Property by the condemning authority. All damages awarded for such Taking as compensation for the diminution in value of the fee of the Property shall be the property of Landlord , and all damages for such Taking as diminution in value of the leasehold interest of Tenant shall be the property of Tenant. Tenant shall also be entitled to any award made for any taking of fixtures and improvements owned by Tenant and for moving expenses, and to any award made for loss of business or the relocation thereof.
>
> In the event of a taking of any portion of the Property, if such taking materially affects the economic feasibility of the continued operation of Tenant's business, Tenant shall have the option to cancel this Lease. In the event Tenant determines to remain in operation, Landlord shall , within six (6) months after said condemnation, rebuild the Premises or Property on the space available, and all rent shall be reduced pursuant to the following formula:***"

Clause 6 of the mortgage document specifically addresses the issue of condemnation and the disposition of the "award received by condemnation proceedings". Initially, the language provides for the mortgagee bank to claim any such award. However, and as both parties acknowledge, this language is specifically qualified such that upon the existence of two conditions, to-wit: first, that Rite Aid remains as the tenant and second, that Rite Aid not be in default under the terms of the lease --- "the

condemnation proceeds will be used and disbursed in accordance with the terms and provisions of the lease." (emphasis added) In this case, the parties stipulate that Rite Aid remains as the tenant and indeed is not in default under the terms of the existing lease. Therefore, the qualification comes into play.

It is appropriate then for the Court to next examine for direction Article 21 of said lease, the same being entitled "Eminent Domain". It is quickly evident that the mortgagee bank is not mentioned in the pertinent language of said lease agreement. Rather, the language is directed toward the adjustment of the rights as between the landlord and the tenant, to-wit: Springfield Venture and Rite Aid. Specifically, the lease provides in the event that the "entire property is taken" or that the tenant can no longer operate its business as a result of the taking, then the "damages awarded for such taking" shall be divided so that the landlord receives the monies for the diminution of the fee of the property and the tenant receives the money for the diminution in value of its leasehold interest.

U.S. Bank contends, however, that it is the second, and not the first, paragraph which is in operation in the case at bar. Specifically, U.S. Bank argues that only a "portion of the property" was taken by the City in this case. In such an instance, U.S. Bank states, the lease makes no mention as to any "damages" awarded for the taking by the City. Rather, in such instance, the tenant is given the option to cancel the lease or to remain in operation, depending on the "economic feasibility" of continuing the business operation; and in the latter event, the landlord would be directed to rebuild the premises and adjust the rent. U.S. Bank concludes that as paragraph two does not speak to a division of the damages award, and as U.S. Bank holds the "superior claim" on the

property, that it then should be entitled to receive the full distribution of the deposit in this case.

After due consideration, this Court is of the opinion that these two paragraphs of the lease should be read in tandem. That is to say that both paragraphs must be read with an eye on the damages to be awarded for the taking in this case. The fact that the second paragraph does not specifically refer to the issue of damages does not serve to thereby assign any damages received for a taking to a third party. Rather, the second paragraph amplifies the adjustment of the rights as between the parties when, instead of a "total" taking, there is but a "partial" taking.

At the end of this exercise, however, the parties remain with two legal instruments which do not adequately spell out the adjustment of rights as between U.S. Bank and Springfield Venture when addressing the division of proceeds from a condemnation action. Complicating this assessment is the apparent fact that Rite Aid, as a result of the appropriation, may now claim under its lease the right to terminate the lease and move its business from the premises. All the parties agree that Rite Aid's continued presence as a viable business at this location is a vital piece of the puzzle: Springfield Venture, apparently, depends upon the income from this lease to pay its mortgage with U.S. Bank; U.S. Bank, for its part, has concluded the same, is worried about a potential default, and believes that if Rite Aid removes its business, that the remaining real estate will not be of sufficient value to serve as viable collateral for its mortgage.

Moreover, Rite Aid has indicated that while it is discerning the future economic feasibility of remaining at this property --- an evaluation which may take one year --- it, in the meantime, may or may not require a reconfiguration and/or reconstruction of the

building in which its business is housed, as well as the parking spaces servicing the same. It was originally represented to the Court that Springfield Venture was desirous of a release of the deposit so that it might accomplish this reconstruction and/or reconfiguration project necessary to maintain the viability of the Rite Aid Pharmacy and the building housing the same. However, the Court has since been advised that it is possible that no reconstruction or reconfiguration may be necessary after all; that Rite Aid and Springfield Venture may well conclude to proceed with the premises as they are.

Finally, it has been represented to the Court that Rite Aid may seek a $4,000.00 plus per month reduction in its lease payments as a result of the loss of the current number of parking spaces servicing its pharmacy --- a circumstance which may potentially also lead to a default by Springfield Venture on its mortgage payments.

So what is the Court to make of the respective motions to disburse the entirety of the deposit to each party? Should, on the one hand, this Court rule that the entire deposit be distributed to Springfield Venture, this potentially could result in a windfall to Springfield Venture to the detriment of U.S. Bank. By way of explanation, the mortgage held by U.S. Bank is a nonrecourse loan, meaning that in the event of a default, U.S. Bank would not be permitted recourse against Springfield Venture; but rather would be limited to the real property and the income generated by that real property. This may not be a problem so long as Rite Aid Pharmacy remains a viable business and is able to pay sufficient funds to ensure that the monthly mortgage payments are being made. However, should Rite Aid leave the premises, and Springfield Venture receive the entirety of the deposit, and should there be a default in the mortgage payments, then U.S. Bank would have no access to any of that money as towards satisfaction of its loan and

could find the value of its collateral rendered problematic. In such an event, the rights of U.S. Bank as an "owner" for purposes of Chapter 163 would not have been secured.

Should, on the other hand, this Court award the entirety of this deposit to U.S. Bank, then likewise this could potentially cause a serious harm to Springfield Venture as the owner of record of the real property. It is conceivable, for instance, that Rite Aid Pharmacy --- as the direct result of the appropriation herein --- could demand a reconstruction or reconfiguration of its premises. If Springfield Venture was unable otherwise to secure the funding for such a project, Rite Aid undoubtedly would vacate the premises, thereby depleting the value of the premises, removing the monthly income generated by this property, and leading to a default on the mortgage. Even as it stands, again as a direct result of the appropriation, Rite Aid may successfully negotiate a reduction of its monthly payment obligation under its lease with Springfield Venture, perhaps to the detriment of Springfield Venture in the amount of $50,000.00 per year --- likewise, the potential consequence of which might be default. Giving the entirety of the deposit to U.S. Bank and causing such a hardship to the owner strikes the Court as incongruous with the constitutional requirement that the governmental authority "compensate" the owner for its loss upon its appropriation.

Moreover, as of this writing, Springfield Venture is currently not in default of its mortgage payments to U.S. Bank. Thus, awarding U.S. Bank the entirety of the deposit would be a benefit which had otherwise not been contracted for between the parties. In other words, U.S. Bank would stand to receive the benefit of an $835,000.00 payment merely on the premise that there might in the future be a problem with Rite Aid

Pharmacy maintaining its business on that property --- surely a scenario necessarily considered at the inception of the mortgage.

The Court at this juncture takes note of R. C. §163.18 and finds that the General Assembly has granted the Court the prerogative, after considering the respective interests of the owners of the property, to make or decline to make a distribution of the deposit or award accordingly. That is to say that the specific language of the statute directs that the Court "may" make distribution", not that it "shall" make distribution. The Court, as part of its decision, considers that the matter of the total compensation by the City remains pending before this Court, leaving open the possibility that additional funds may also be deposited for distribution.

After due consideration, the Court finds that the instant case presents sufficient uncertainty as to the extenuating circumstances and potential future developments to warrant the Court to determine that it is best and not appropriate to that it make a total distribution of the deposit at this time. Accordingly, this Court will Order that the Clerk release $400,000.00 of the deposit herein as follows, to-wit: $250,000.00 to Springfield Venture, and $150,000.00 to U.S. Bank. Clearly, there is not at this time a perfect formula to which this Court can direct the parties to explain this particular distribution order. Rather, the Court hopes to accomplish the following, to-wit: first, to afford Springfield Venture sufficient capital to avoid a default of the mortgage payments; second, to afford Springfield Venture sufficient capital to undergo a reconstruction or reconfiguration project for the benefit of Rite Aid; and, third, to begin to address the protection of the interests of U.S. Bank and the integrity of its collateral. The balance of the deposit shall remain with this Court in a non-interest bearing account and remain

available for distribution upon the proper representation by a party of a specific and justifiable need thereto.

IT IS SO ORDERED.

RICHARD P. CAREY, JUDGE

cc: Andrew Burkholder, Esq.
James Cobb, Esq.
Stephen Jones, Esq.
Thomas Young, Esq.
William Hoffman, Esq.