

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CITY OF PONTIAC,

Plaintiff,

v.

Case No. 14-139761-CC
Hon. Michael Warren

OTTAWA TOWERS II, LLC, et al.,
Defendants.

OPINION & ORDER GRANTING
MOTION FOR SUMMARY DISPOSITION (FOR LACK OF SUBJECT MATTER
JURISDICTION) FILED BY DEFENDANTS OTTAWA TOWER II, LLC AND
CHARLES STEPHENS AS TRUSTEE FOR NORTH BAY DRYWALL, INC PROFIT
SHARING PLAN AND TRUST¹

At a session of said Court, held in the
County of Oakland, State of Michigan
October 21, 2014.

PRESENT: HON. MICHAEL WARREN

OPINION

I

Overview

In the instant condemnation action, Plaintiff City of Pontiac is seeking to exercise its power of eminent domain to acquire property rights existing under a Declaration of Easements dated May 8, 1980 in connection with certain improved property, including the Phoenix Center Parking Garage parcel (the “Deck” or “Garage”) and nine surrounding parcels. The Ottawa Towers Defendants own what are now Parcels 4, 5 and 6 described in the Plaintiff’s Response. These Defendants declined the City’s offers of compensation tendered in March 2014 under MCL 213.55 of the Uniform Condemnation Procedures Act (“UCPA”). Before the Court is Ottawa Towers’ Motion

¹ Hereinafter “Ottawa Towers” or the “Ottawa Towers Defendants.”

for Summary Disposition under MCR 2.116(C)(4) which argues on a variety of grounds that the City's offers were not tendered in "good faith" as is required by MCL 213.55(1), thereby warranting dismissal of the case (without prejudice) because, as a matter of law, a good faith offer is a necessary condition precedent to invoking the subject matter jurisdiction of the circuit court in condemnation actions.

Extensive oral argument on the Motion was conducted on August 27, 2014. At stake is whether this action must be dismissed without prejudice for lack of subject matter jurisdiction because the "good faith offer" to purchase made under MCL 213.55 failed to include all tangible and intangible property and property rights? The answer is "yes" because the Plaintiff's offer omitted any compensation for a lien held by Ottawa Towers in connection with the Deck.²

II

Standard of Review

Subject matter jurisdiction is the "power of a court to act and the authority of a court to hear and determine a case." *Trost v Buckstop Lure Co*, 249 Mich App 580, 586 (2002), quoting *Grubb Creek Action Committee v Shiawassee Co Drain Com'r*, 218 Mich App 665, 668-669 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(4) is resolved on the basis of the pleadings and evidentiary support, if any, submitted by the parties. MCR 2.116(G)(5). When a court lacks subject matter jurisdiction, any action it takes, other than to dismiss the case, is absolutely void. *McCleese v Todd*, 232 Mich App 623, 627 (1998).

² In light of this ruling, the Court need not address the parties' remaining arguments.

III

The good faith written offer to purchase requirement of MCL 213.55 and its status as a threshold requirement to invoking a circuit court's subject matter jurisdiction in a condemnation action

MCL 213.55(1) of the UCPA provides, in pertinent part:

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. . . . The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as 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. . . .

"[P]roperty" is defined in the UCPA as "land, buildings, structures, tenements, hereditaments, easements, tangible and intangible property, and property rights, whether real, personal, or mixed[.]" MCL 213.51(i). See also *In re Acquisition of Land for Cent Industrial Park Project*, 127 Mich App 255, 261 (1983) ("*Industrial Park I*")³ citing what is now MCL 213.51(i). In *Industrial Park I*, the Court of Appeals found that the failure to include a component of property in an offer to purchase renders the offer defective, and thus lacking in good faith:

³ Ottawa Towers references this decision as *City of Detroit v Goodwill Cmty Chapel Church*, 127 Mich App 255 (1983).

Just compensation is defined as the amount of money which will put the person whose property has been taken in as good a position as the person would have been in had the taking not occurred. In *re Widening of Bagley Avenue*, 248 Mich 1, 5 (1929). See, also, SJI 90.05. Given these definitions, just compensation must include the value of movable trade fixtures or the detach-reattach costs of those fixtures. Thus, a good faith offer to purchase made under § 5 of the UCPA must include the lesser of either the appraised detach-reattach costs of the movable trade fixtures or their value-in-place. Although it has been argued that the offer to purchase need not include the value-in-place or detach-reattach cost of movable fixtures because they are too speculative, we disagree with this assertion. See *Algonac v Robbins*, 69 Mich App 409 (1976). There is nothing speculative in offering the property owner the lesser of either the movable fixtures' value-in-place or their detach-reattach value. [*Industrial Park I, supra* at 261.]

In light of this finding, the Court of Appeals in *Industrial Park I* remanded the proceeding, but later reiterated its decision that the defendant's failure to submit an offer including a component of the property (the value of moveable fixtures or the detach/reattach costs of those fixtures) established that the offer lacked the requisite good faith required by MCL 213.55(1), thereby obligating the trial court to dismiss the action for want of subject matter jurisdiction. In *Re Acquisition of Land for the Central Industrial Park Project*, 177 Mich App 11, 17 (1989) ("*Industrial Park II*").⁴ The Court explained that the good-faith written offer to purchase requirement contained in MCL 213.55(1) is "a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action" and cannot be waived. *Industrial Park Project II, supra* at 17 (applying *In re Petition of Rogers*, 243 Mich 517 [1928]). Thus, a trial court is "obligated to dismiss [the] action [without prejudice] for want of subject matter jurisdiction" if it concludes that the plaintiff did not make a good-faith offer to the defendant. *Id.* at 17, 18. The plaintiff "could, of course, reinstate proceedings after it tendered a good-faith offer to defendant." *Id.* at 17 n 1. Nevertheless, "it would be inappropriate for . . . the trial court to retain jurisdiction over a matter which is

⁴ Ottawa Towers reference this decision as *City of Detroit v Goodwill Cmty (After Remand)*, 177 Mich App 11 (1989).

dismissed for want of jurisdiction” and, therefore, “there is no jurisdiction to be retained.” *Id.* at 18.

In sum, “property” under the UCPA includes all intangible property and property and property rights whether real, personal or mixed, *Industrial Park I, supra* at 261, citing MCL 213.51(h) (now MCL 213.51(i)), and the failure to include in an offer all interests in the property means it lacks the good faith required by the statute to provide the circuit court jurisdiction. *Industrial Park I, supra* at 261; *Industrial Park II, supra* at 17.

IV

The Plaintiff’s written purchase offer lacks good faith and, therefore, this action must be dismissed without prejudice for want of subject matter jurisdiction

In the instant matter, there is no genuine dispute that Defendant Ottawa Towers holds a lien on the property to be condemned and that the Plaintiff’s offer fails to include any compensation for eradicating the lien. The lien was established by the Declaration of Easements which provides for a lien if an owner performs another owner’s repair obligations (emphasis supplied):

If any Owner shall fail or omit to perform any of its obligations hereunder...which failure or omission may cause any provision of the easements . . . contained herein to be impaired, breached or nonperformed, the Owner of such Site or Improvements so in default shall per shall perform the same . . . and upon failure to do so . . . then any other Owner shall have the right . . . to cure such default Such other Owner or Owners, upon so performing, shall have a lien for the full and complete cost and expenses of curing such default . . . against the real property of defaulting Owner(s)

[Motion Ex C, Paragraph 10 on page 8.]

Under established Michigan law, a lien is an interest in real estate, which is a property right. See *Fredericks Lumber Co v Evans*, 266 Mich 486, 489 (1994); *Walworth v*

Wimmer, 200 Mich App 562, 564 (1993) (holding that a lien is a security interest in real property). The lien therefore qualifies as “property” under the UCPA. See MCL 213.51(i). The Plaintiff’s suggestion that the only property to be taken in these proceedings is the non-exclusive reciprocal easements of ingress and egress under the Declaration of Easements and that Ottawa Towers have no lien on these easements ignores the fact that in taking Ottawa Towers’ easement to demolish the Deck to which the easements indisputably apply, the Plaintiff is destroying the property to which the lien applies. Michigan law has long recognized that disposing of property to which a lien applies disposes the lien itself. *Sleeper v Wilson*, 266 Mich 218, 222 (1934) (holding that dissemination of property subject to a lien would “impair, if not wholly destroy,” the lien). Thus, in taking Ottawa Towers’ easement to demolish the Deck, the City is also taking Ottawa Towers’ lien.

Likewise unavailing is the Plaintiff’s reliance on MCL 129.201 to argue that the lien is not valid because MCL 129.201 does not provide private parties lien rights on public buildings. However, MCL 129.201 simply exempts public buildings from liens which would otherwise be asserted by a stranger to title attempting to record a mechanic’s lien against municipal property. MCL 129.201 has no application here. The explicit contractual terms set forth in the Declaration of Easements is between co-owners – it is not a mechanic’s lien established by law which is otherwise addressed by MCL 129.201.

Thus, under the principles of *Industrial Park I* and *Industrial Park II*, the Plaintiff’s offer to purchase lacks the good faith required by MCL 213.55(1) because it does not include compensation for the lien held by Ottawa Towers which is a component of the property to be taken. Although the Plaintiff contends MCL 213.55(3) provides a process for addressing incomplete offers,⁵ the Court in *Industrial Park II*, *supra* at 17-18

⁵ MCL 213.55(3)(a) is silent on court proceedings – instead, it provides for the filing of a claim with the condemning agency which is not at issue here.

specifically rejected the notion that a circuit court can retain jurisdiction to allow the plaintiff to cure the defect in its good faith offer and resume the condemnation proceedings. Consequently, under *Industrial Park II, supra* at 17-18, this Court is “obligated to dismiss [the] action [without prejudice] for want of subject matter jurisdiction.” This Court is bound to follow the binding precedent of *Industrial Park II*.

ORDER

Based on the foregoing Opinion, Ottawa Towers Defendants’ Motion for Summary Disposition (for lack of subject matter jurisdiction) is GRANTED and, thus, this action is DISMISSED WITHOUT PREJUDICE.⁶ THIS RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/Michael Warren

HON. MICHAEL WARREN
CIRCUIT COURT JUDGE

⁶ Whether the Ottawa Towers Defendants are entitled to attorney fees and costs has not been adequately briefed. Thus, although requested, same are denied without prejudice. If appropriate, fees and costs may be pursued by separate motion as a post-judgment matter.