Court Clarifies Rules Concerning Litigation Expenses in Eminent Domain

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Shortly before an eminent domain trial, a government agency and a property owner exchange a statutory final offer and final demand. The statute's sole purpose is to encourage settlement before trial, providing a carrot (to the property owner) and a stick (to the condemning agency). If the matter fails to settle before trial, the owner can seek an award of litigation expenses (i.e., attorneys' fees and expert costs) if the court ultimately determines that, in light of the outcome, the agency's final offer was unreasonable and the owner's final demand was reasonable. (See Code Civ. Proc., § 1250.410.)

A recent published decision by the California Court of Appeal, *Dept. of Transportation v. Menigoz* (March 1, 2012), makes clear that the opportunity to recover litigation expenses requires an actual trial. If the matter settles at any time before the jury is empanelled, the agency has no liability for litigation expenses, regardless of how unreasonable its pre-settlement conduct may have been. On the other hand, once trial commences, the agency could face liability for litigation expenses – even if the parties reach a settlement before the trial ends.

Background

In *Menigoz*, like any condemnation action, the condemning agency and the property owner exchanged valuation reports a few months before trial. Expert depositions followed, and pursuant to section 1250.410, the parties exchanged a final offer and final demand 20 days before trial. The condemning agency offered $159,000, and the owner demanded $189,000, plus interest and costs.

Five days before trial, the agency accepted the owner's demand, and the parties entered into a stipulated judgment. The judgment specified that the owners would be entitled to interest and costs, but there was no specific mention of "litigation expenses." The owners then filed a motion for over $57,000 in litigation expenses, and the trial court granted the motion.

The trial court reasoned that the agency's acceptance of the owner's final demand proved both (1) that the owner's demand was reasonable, and (2) that the agency's offer was unreasonable. The agency filed a writ of mandate with the Court of Appeal, claiming that the owner is not entitled to litigation expenses where the parties reach a settlement.

The Writ Procedure

One would think the agency would have appealed the court's decision, but it did not. Instead, the agency sought a writ of mandate, a seemingly odd choice. But this decision was no accident. Had the agency filed a traditional appeal, the Court of Appeal likely would not have heard the case. Because the judgment entered was stipulated, the judgment was not appealable.

And as we learned last year in *City of Gardena v. Rikuo Corp.* (2011) 192 Cal.App.4th 595, if the underlying judgment is not appealable, post judgment orders similarly are not appealable. Thus, the agency wisely chose to seek a writ, which the Court of Appeal concluded was a proper vehicle for challenging the trial court's ruling because, as discussed below, the trial court exceeded its jurisdiction in applying section 1250.410 to a settlement reached before trial.

The Court's Decision

Reaching the merits, the Court first examined the key statute. Section 1250.410 provides:

> If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

The Court of Appeal dissected the statutory language, concluding that the statute contemplates a decision on litigation expenses ***only after a trial***. Moreover, one of the statute's purposes is to encourage settlement and avoid trial. The Court explained: "An award of litigation expenses in the current situation would discourage settlement by forcing the government to take into account its liability for significant additional expenses even if it were otherwise inclined to accept the property owner's reasonable demand."

The Court rejected application of an earlier case, *Coachella Valley County Water Dist. v. Dreyfuss* (1979) 91 Cal.App.3d 949, in which the Court of Appeal awarded litigation expenses in an eminent domain case that did not proceed to a jury verdict. In that case, however, the jury had been empanelled and sworn before the parties settled. The Court of Appeal concluded that this made all the difference, because once trial commenced, the case fell within the scope of section 1250.410.

As a result, the *Menigoz* Court essentially established a bright-line rule: ***litigation expenses are potentially recoverable once trial commences, but not a second before.*** Based on this conclusion, the Court held that the trial court exceeded its jurisdiction in awarding litigation expenses based on the pre-trial settlement. The Court issued a writ, mandating that the trial court vacate the award of litigation expenses.

Lessons Learned

The *Menigoz* decision provides important lessons for both agencies and property owners. For agencies, in particular, the decision highlights the importance of documenting settlements properly. Eminent domain cases often settle in the early stages of trial. By that time, the trial court may have made significant rulings

on motions *in limine*, giving the parties guidance on how the trial will likely play out.

Based on *Menigoz*, agencies must make absolutely certain that any settlement entered once trial commences contains a clear, unmistakable statement that the settlement is inclusive of litigation expenses. Failure to document this could well result in a subsequent award of litigation expenses or, at the very least, a costly battle of whether the court should award them. Beyond that, agencies should also take caution when entering into settlement near the trial's outset. For example, if this settlement had occurred after rulings on motions *in limine* and/or during the jury *voir dire*, would the Court have reached the same decision, or would it have extended the ruling in *Coachella Valley County Water Dist. v. Dreyfuss*? Our guess is that the result likely would have been the same, but no reason exists for an agency to test that theory when it is easy to document around the issue.

From the owner's perspective, *Menigoz* provides an opportunity to "steal" an award of litigation expenses. Owners and, more specifically, their attorneys, need to pay close attention to the language in any settlement document negotiated after trial commences. If a deal gets inked without specifying a waiver of litigation expenses, owners' attorneys should analyze whether there may be a basis for an award. While the filing of such a motion might be viewed as a bit underhanded, one might argue that the *Menigoz* decision could create a malpractice problem for any attorney who failed to consider such a motion where the facts warrant it.