

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2002-002301

07/23/2004

HON. EDWARD O. BURKE  
FOR HON. MARGARET H. DOWNIE

CLERK OF THE COURT  
M. MINKOW  
Deputy

FILED: 07/26/2004

STACEY BREITBART NAPP

PHILIP C GERARD

v.

DAVID NAPP, et al.

STEVEN D WOLFSON

JUDGE DOWNIE

MINUTE ENTRY

The Court conducted a hearing regarding the parties' disagreement over the appraisals of Sunshine Key. Having heard the testimony of the witnesses, reviewed the exhibits received in evidence, and read the post-hearing memoranda, the Court enters the following decision.

On November 21, 2003, the parties reached an agreement in open court under Rule 80(d) of Civil Procedure that each party would supply an appraisal of Sunshine Key to establish Wife's interest therein by March 1, 2004. Husband's appraisal was to have a floor of \$15,100,000.00. There were no restrictions on Wife's appraisal. If the average of the two appraisals exceeded the \$25,943,775.00, the figure used in the settlement negotiations which consists of all the capital in the property plus the preferred return (the "waterfall"), then the amount by which the average of the two appraisals exceeded \$25,943,775.00 would be deemed to be the community's interest in that property and Wife would receive 6.25% thereof. Wife's proportionate interest was to be added to the promissory note executed by Husband and be all due and payable three years from the date of the first payment on the note. Husband would have the right to obtain a 5% discount on the unpaid balance if he paid the entire note off within 12 months of the date of the first payment. (Exhibit 7)

The parties agreed that they would present any disputes that existed at the conclusion of the appraisal process concerning the market value approach taken by the appraisers to the Court.

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The appraisals were to be based on current income through December 31, 2003, at replacement value or highest and best use or on the current income approach, whichever is the most applicable, with no minority discount.

Wife produced a "Complete Summary Appraisal" of Sunshine Key RV Park by Greater Caribbean Appraisal Services (Exhibit 1) with a market value of \$30,000,000.00. Husband submitted a "Complete Summary Real Estate Appraisal Report of the 400 Space Sunshine Key RV Resort and Marina" prepared by Whitcomb Real Estate showing a market value of \$20,500,000.00 (Exhibit 24).

The average of the two appraisals is \$25,250,000.00. If the appraisals are accepted at face value, the marital community would have no interest in Sunshine Key i.e.  $\$25,250,000 - 25,943,775 = (\$693,775)$ .

On April 5, 2004, Husband objected to the appraisal submitted by Wife (Exhibit 2). On April 5, 2004, Wife objected to the appraisal submitted by Husband (Exhibit 3) and each side submitted a brief in support of their positions.

The parties did not appoint the Court as an arbiter to perform an arithmetical averaging of two appraisals and compare the result to \$27,943,775.00. The parties did not need a court to perform this simple function. The Court finds the parties intended that, in the event of a dispute regarding the appraisals, the court would analyze the two appraisals and arrive at a fair and reasonable valuation of Sunshine Key for the purpose of the parties divorce.

The following is the Court's analysis:

"...the qualification of a witness to testify on this subject (the value of a sand and gravel mine) is within the trial court's sound discretion. If these witnesses failed to make a thorough and complete capitalization valuation according to the standard methodology of professional appraisers, then that failure went to the weight of their opinions rather than to admissibility.... Any resulting conflict was for the jury to resolve." Maricopa County v. Barkley, 168 Ariz. 234, 239-40, 812 P.2d 1052 (App. 1990).

Having listened to the testimony of the appraisers and studied their reports, the Court finds that the Whitcomb appraisal (Exhibit 24) offered by Husband is deficient for the following reasons:

1. No consideration was given to the Development Agreement for Sunshine Key (Exhibit 18).
2. It used RV Park comparable sales from all over Florida rather than just the Florida Keys.

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3. It is not based on the highest and best use for the property.
4. The appraiser was not aware that NHC already had a development permit (Exhibit 20).
5. The appraiser was not aware that EMB/NHC, LLC had made a \$21,014,000.00 buy/sell offer on January 8, 2004 (Exhibit 21).
6. The appraiser was not aware that Cortex Acquisition Group, LLC had submitted a \$25,000,000.00 letter of intent to purchase the property on February 25, 2004 (Exhibit 23). While it is true that offers to purchase are inferior types of sales evidence, State v. McDonald, 88 Ariz. 1, 8, 352 P2d 343 (1960), if established as bona fide they can be considered. By failing to disclose the offer Mr. Napp prevented Mr. Whitcomb from making that analysis.
7. The appraiser was not aware that Mr. Craig said in a November 11, 2003, letter: "All members of the team agree that the master plan represents the highest and best use."

Mr. Whitcomb was not aware that NHC had prevailed in the Florida Court of Appeals after his date of valuation. His valuation specifically states: "We take no responsibility for any events, conditions or circumstances affecting the subject property or its value, that take place subsequent to either the effective date of value cited in the appraisal or the date of our field inspection, whichever occurs first." (Exhibit 24, page 14). Mr. Napp argues in his brief that the case was simply remanded to the trial court, implying that a new trial would take place. That did not happen. The case was remanded to the trial court for the entry of an order consistent with the opinion of the appellate court.

Having watched the entire videotape of the presentation to the Monroe County Planning Commission and having reviewed the decision of the Florida Court of Appeals, the Court finds that there will be no significant governmental stumbling blocks to proceeding with the redevelopment of the project.

Although Mr. Craig testified that NHC has not met the requirements to get a permit, Monroe County looks favorably on this project. The Court finds that it is unlikely that NHC, which has spent over \$1,000,000.00 working on the redevelopment, would not pursue the project. The Court disagrees with Whitcomb's statement that the highest and best use is the current use. Mr. Whitcomb was not aware that Mr. Craig in his November 11, 2003, letter said: "All members of the team agree that the master plan represents the highest and best use."

Section 2.2(X) of the USPAP Guidelines requires an appraiser to have an opinion of the highest and best use. Mr. Whitcomb did not and he admitted on redirect examination that he should have put a discussion of the highest and best use in his report.

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The deficiencies in the Whitcomb appraisal are so fundamental that it cannot be given any weight and must be disregarded. Although the result is drastic, it is due in part to Mr. Napp's failure to thoroughly advise the appraiser of all the salient facts regarding Sunshine Key, which suggests a bad faith failure to comply with the parties' settlement agreement.

The Court finds that the following criticisms of the Nienaber appraisal are valid:

1. It was improper to reduce the operating expenses from 59% to 45%.
2. Valuing the units at \$52,000.00 per unit is not fully justified by the data provided. It appears that \$45,000.00 would be a more accurate number.
3. The appraiser valued buildings that were to be constructed without considering that they would cost \$2,180,350.00 to construct.
4. The appraiser appears to have double counted the RV operations in the marina calculation.

The Court finds that the value of Sunshine Key for the purpose of this action is \$26,717,162.00. The Court arrived at that figure by using \$45,044.00 for comparable sales per unit which was arrived at by averaging the three closest comparable sales numbers, i.e., \$56,923.00, \$50,022.00 and \$28,186.00. That gives a value of \$17,927,512.00 for the 398 units, \$8,140,000.00 for the marina and \$2,830,000.00 for the retail and gas components for a total of \$28,897,512.00. Subtracting the building costs of \$2,180,350.00 gives a final result of \$26,717,162.00.

Subtracting the capital waterfall of \$25,943,777.00 from the Court's value of \$26,717,162.00 leaves \$773,387.00. 6.25% of \$773,387.00 is \$48,336.69, which the Court finds shall be added to Mr. Napp's promissory note to Mrs. Napp.

FILED: Exhibit Worksheet