

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-008132

11/17/2015

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
T. DeRaddo
Deputy

CITY OF PHOENIX, THE

DIANE M MILLER

v.

ALLEN H G CHEUNG, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER

UDER ADVISEMENT RULING

The Court has considered the Motion for Partial Summary Judgment Re: TCE Compensation filed by Plaintiff the City of Phoenix (“the City”) on July 24, 2015, the Response and Cross-Motion filed by Defendants Allen H.G. Cheung and Diana S.K. Cheung (“the Cheungs”) on August 28, 2015, the City’s Reply and Response to the Cross-Motion, filed September 8, 2015, and the Cheung’s Reply in Support of the Cross-Motion, filed September 25, 2015. The Court has also considered the argument of counsel and the applicable law.¹

The Motion and Cross-Motion address the same issue: whether the Cheungs are entitled to compensation above fair rental value for a temporary construction easement. The City argues that the Cheungs are entitled only to the fair rental value of the property encumbered by the temporary easement; the Cheungs argue that they are entitled to severance damages for the damage to their remaining property.

A court may enter summary judgment only if “there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Rule 56(a), Ariz.

¹ The Court declines to strike the settlement agreement submitted with the City’s Motion; the Court does not find that the City attached the agreement for an improper purpose.

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R. Civ. P. See also *Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 137-38, ¶ 7, 263 P. 3d 683, 686-87 (App. 2011). In other words, a motion for summary judgment should be granted “if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

In deciding a motion for summary judgment, the Court must view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. See, e.g., *Espinoza v. Schulenburg*, 212 Ariz. 215, 216, ¶ 6, 129 P.3d 937, 938 (2006).

The Arizona Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having first been made . . .” Ariz. Const. Art. 2 § 17. “‘Just compensation’ implies the full monetary equivalent of the loss sustained by the owner whose land the government has taken or damaged.” *State ex rel. Miller v. Filler*, 168 Ariz. 147, 149, 812 P.2d 620, 622 (1991). Just compensation is designed to place the property owners in the position they would have been in had no taking occurred. *Id.*

When a taking is partial, just compensation is defined as “the damages that will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.” A.R.S. § 12-1122(A) (2).

Citing *City of Phoenix v. Leroy’s Liquors*, 177 Ariz. 375, 868 P.2d 958 (1993), the City argues that because no statutory or case law authorizes severance damages for a temporary construction easement, the Cheungs are not entitled to seek such damages. The Court agrees with the City that *Leroy’s Liquors* stands for the proposition that loss of profits is non-compensable as an independent item of damages. But the Court does not read *Leroy’s Liquors* to prevent the Cheungs from presenting evidence of lost rents as evidence of the diminution of the value of their property.

The City also argues that the Cheungs’ expert valuation witness did not conduct an appropriate valuation analysis. That argument goes to the factual basis for any severance damages, not whether such damages may legally be sought in the first place. On the record before it, viewing the evidence in the light most favorable to the non-movant on the City’s Motion for Summary Judgment, the Court finds there is a genuine material issue of fact regarding the severance damages calculation made by the Cheungs’ expert witness. See *State ex rel. Miller v. Wells Fargo Bank of Arizona, N.A.*, 194 Ariz. 126, 131, ¶ 25, 978 P.2d 103, 108 (App. 1998) (alleged failure of expert to conduct valuation according to standard methodology of professional appraisers went to weight of opinions, not admissibility).

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For the foregoing reasons,

IT IS ORDERED denying the City's Motion for Summary Judgment.

IT IS FURTHER ORDERED granting the Cheungs' Cross-Motion for Summary Judgment.