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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1861**

State of Minnesota,
by its Commissioner of Transportation, petitioner,
Respondent,

vs.

CSLK Properties, LLC, et al.,
Respondents Below,

Larry S. Hyman,
in his capacity as assignee for the benefit of creditors of
Diamond Products Company,
Appellant,

ASAP Capital Mez Fund V, LLC,
Appellant,

M. Rasoir Ltd.,
Respondent.

**Filed May 7, 2012
Affirmed
Harten, Judge***

Ramsey County District Court
File No. 62CV106042

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Considered and decided by Cleary, Presiding Judge; Klaphake, Judge; and Harten, Judge.

UNPUBLISHED OPINION

HARTEN, Judge

Appellants, lessees of a condemned property, challenge the denial of their motion to compel arbitration of the apportionment of the condemnation award between themselves and respondent landowner. Because the arbitration provision of the parties' lease includes conditions precedent that have not been fulfilled and because Minn. Stat. § 117.085 provides that, at the request of a party, the court-appointed commissioners who determine the condemnation damage award will also apportion it, we affirm.

FACTS

In 1993, M. Rasoir Ltd. (Rasoir), the owner of property in downtown St. Paul, leased some property to The Gillette Company (Gillette) in two ground leases. In 2000, Gillette assigned its interest in the property to Diamond Products (Diamond).¹ On 3 June 2010, in connection with the reconstruction of the Lafayette Bridge, respondent State of

¹ Diamond is now being liquidated in Florida. Appellant Larry Hyman is the assignee for the benefit of Diamond's creditors, and appellant ASAP Capital Mez Fund V, LLC, holds a security interest on Diamond's interests in the leased property.

Minnesota by its Commissioner of Transportation (MnDOT)² filed a petition for condemnation of some of the land owned by Rasoir and leased to Diamond.³

On 5 October 2010, MnDOT filed with the district court its appraisal of the property's value, \$2,294,000, of which Rasoir's damages were \$1,500,000 and Diamond's were \$794,000.⁴ Appellants challenge this award, and Rasoir may also challenge it. In August 2012, the court-appointed commissioners plan to hold hearings on the parties' evidence in support of a damages award greater than that offered by MnDOT. Rasoir is expected to ask the commissioners to apportion the damages; appellants seek to compel arbitration of the apportionment.⁵

Appellants moved to compel arbitration of the apportionment of damages. Rasoir opposed the motion. Following arguments, appellants' motions to compel arbitration were denied. Appellants challenge that denial, arguing that the parties' lease mandates arbitration of the apportionment of the condemnation award and that Minn. Stat. § 117.085 does not preclude an order compelling arbitration.

² Although MnDOT filed a respondent's brief in this appeal, it takes no position on the issues being decided.

³ MnDOT sought the land in connection with the reconstruction of the Lafayette Bridge. Another part of the land owned by Rasoir and leased to Gillette was condemned by the Metropolitan Council in connection with the construction of the light rail system. Appellants also moved to compel arbitration of the apportionment of damages in that case, and the district court granted the motion. Respondent petitioned for discretionary review in this court, which denied the petition. *See Metro. Council v. M. Rasoir, Ltd.*, No. A12-63 (Minn. App. Feb. 21, 2012).

⁴ *See* Minn. Stat. § 117.036 (2010) (requiring acquiring authority of condemned property to obtain at least one appraisal).

⁵ We note that the hearing has been scheduled to occur after the release of our decision.

DECISION

1. The Lease

The district court determined that the parties' lease does not require that the apportionment of the condemnation damages be resolved through arbitration. We review such a determination de novo. *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995). “[A reviewing court] should resolve any doubts concerning the scope of arbitrable issues in favor of arbitration whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* (quotation omitted).

The lease between Rasoir and Gillette provides in relevant part:

14. If at any time during the term of this lease or any extension thereof all of any part of portion of the land included in the description of the Premises be taken or acquired by condemnation or by the exercise of the right of eminent domain, and this Lease is not by reason thereof terminated as hereinafter provided, any and all moneys and/or damages awarded on account of or by reason of such taking shall be divided between the parties hereof as follows:

a) That part or proportion thereof representing the value awarded for the taking of the building, structures, or other improvements upon the Premises and for the taking of Gillette's interest or Leasehold estate as it existed immediately prior to such taking shall be paid to and shall be the sole property of Gillette.

b) That part or proportion thereof representing the value awarded for the taking of the land included in the description of the Premises (exclusive of buildings, structures and other improvements thereon, and the value of Gillette's Leasehold estate as it existed

immediately prior to such taking) shall be paid to and shall be the sole property of Rasoir.

If more than one-third in area of said Premises be so taken or if the part of the Premises remaining after such taking, regardless of the proportion or amount of such Premises so taken, be insufficient for the operation of the business conducted in or on the buildings, structures or improvements erected on said Premises by Gillette for their designated purpose or purposes, then and in said event, Gillette shall have the right and option to terminate this Lease in which event all moneys and/or damages awarded on account of such taking shall be divided between the parties as provided in this paragraph 14 hereof.

If the Lease is terminated pursuant to the provisions of this paragraph, Gillette shall be entitled to damages from the condemnor or from Rasoir if the condemnor shall not make a separate award on account of the value of such buildings, structures and improvements, and its Leasehold estate as it existed immediately prior to such termination as hereinabove provided. In addition thereto, Gillette shall be entitled to receive from said condemnor any award for damages to its property in or upon the Premises and any award for moving or other expenses of loss sustained by it.

If in the event of the said taking of said Premises, whether in whole or in part, and by reason thereof this Lease is or is not terminated and the parties hereto are unable in writing to agree upon the separate value of the land included in the description of the Premises exclusive of any buildings, structures or improvements thereon and the separate value of such buildings, structures or improvements, exclusive of land, and the separate value of Gillette's Leasehold estate, such separate values shall be determined by appraisers who shall be selected and shall proceed as provided under the provisions of paragraph 4 hereinabove contained.

(Emphasis added.) The district court concluded that, under the lease, the separate values of Rasoir's and Gillette's interests in the condemned property are to be determined by arbitration only if two conditions precedent have occurred: first, the condemnor, i.e., that

the court-appointed commissioners,⁶ fail to make a separate award to appellants, so that appellants will be entitled to damages from Rasoir, and second, that appellants and Rasoir fail to agree in writing on appellants' portion of the damages. Because neither of these conditions precedent have yet occurred (and cannot occur until after the hearing in August 2012 when the commissioners will hold a hearing), the district court concluded that "[appellants] have not acquired yet any rights under the contract to enforce arbitration" and "[their] request [for an order to compel arbitration] is denied and rendered moot." See *Aslakson v. Home Sav. Ass'n*, 416 N.W.2d 786, 789 (Minn. App. 1987) ("[A condition precedent] prevents a party from acquiring any rights under the contract unless th[at] condition[] occur[s].")

Appellants argue that the language "or from Rasoir if the condemnor shall not make a separate award on account of the value of such buildings, structures and improvements, and its Leasehold estate . . ." is not a condition precedent to arbitration of apportionment because it refers to a situation in which "Rasoir makes a separate deal with the condemnor that excludes [appellants]" and does not concern the values of Rasoir's and appellants' shares. But arbitration between the parties to the lease would be

⁶ Appellants object to the district court's view that the "condemnor" is actually the court-appointed commissioners and argue that the only condemnor is MnDOT. But appellants also say that, because they "disagree with the amount of compensation offered by MnDOT in this case . . . [they] will submit evidence in support of an award of damages in excess of MnDOT's offer of compensation to the court-appointed commissioners for resolution." See Minn. Stat. § 117.075 ("[t]he court by an order shall appoint three disinterested commissioners, and at least two alternates, to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking." Thus, while MnDOT made the condemnation decision, the commissioners will make the valuation decision, and it is the valuation decision that appellants seek to have arbitrated.

unnecessary if the condemnor made one award to the lessor (Rasoir) and one to the lessee (Gillette, now appellants): only if the condemnor makes one undivided award solely to the lessor is there anything to apportion by arbitration.

The district court's conclusion that the lease agreement does not compel arbitration of apportionment unless and until the commissioners fail to apportion the damages and the parties fail to agree in writing on apportionment is not erroneous.

2. Minn. Stat. § 117.085

“Statutory construction is . . . a legal issue reviewed de novo. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).

[The court-appointed commissioners] shall make a separate assessment and award of the damages which in their judgment will result to each of the owners of the land by reason of such taking and report the same to the court. . . . Upon request of an owner the commissioners shall show in their report the amount of the award of damages which is to reimburse the owner and tenant or lessee for the value of the land taken, and the amount of the award of damages, if any, which is to reimburse the owner and tenant or lessee for damages to the remainder involved, whether or not described in the petition. The amounts awarded to each person shall also be shown separately.

Minn. Stat. § 117.085 (2010).⁷ The district court concluded that this was “the mandatory controlling statute” and that it gave the commissioners the duty of apportioning condemnation awards to “each person,” whether owner or lessee. The lessees cannot

⁷ While the statute does not explicitly state that court-appointed commissioners must report on the amount of condemnation damages to be awarded to owners and lessees only if the owners and/or lessees have rejected the condemnor's initial appraisal of the damages required by Minn. Stat. § 117.036, this may be inferred.

give to arbitrators a duty that the legislature has given to the court-appointed commissioners.

Caselaw construing the statute is consistent with this position.

[The legislature] intended that the report of the commissioners should show separately the amount of compensation to reimburse the owner and tenant or lessee for damage to their respective interests in the property taken. By allocating the separate amounts of compensation, subsequent litigation between the owner of the property and those having a lesser interest may be obviated.

State by Lord v. Frisby, 260 Minn. 70, 75, 108 N.W.2d 769, 772 (1961);⁸ *see also Helgeson v. Gisselback*, 375 N.W.2d 557, 560 (Minn. App. 1985) (citing *Frisby* for the proposition that “commissioners have the statutory authority to apportion awards between different owners so that claims might be settled in a single proceeding”).

Appellants argue that both the Federal Arbitration Act (FAA) and the Minnesota Arbitration Act (MAA) preclude the application of Minn. Stat. § 117.085. The district court concluded that, because the conditions precedent to arbitration have not occurred, “[appellants’] arguments under MAA and FAA have no existence other than in the realm of future possibility and are purely hypothetical and are not justiciable.” Both the FAA and the MAA become relevant only when the parties have agreed, in writing, to submit

⁸ *Frisby* concluded that the language of the predecessor statute, Minn. Stat. § 117.08 (1960) (“[T]he commissioners shall show in their report the amount of damages which is to reimburse the owner and tenant or lessee The amounts awarded to each person shall also be shown separately”) was directory, not mandatory, in part because it was “not designed for the protection of third persons.” *Frisby*, 260 Minn. at 76, 108 N.W.2d at 773. We note that, by adding the phrase “Upon request of an owner” before the language quoted above, the Legislature gave owners the right to have the commissioners apportion the gross award so that, if an owner requests it, apportionment is now mandatory for the commissioners. *See* Minn. Stat. § 117.085.

an issue to arbitration. *See* 9 U.S.C. § 2 (“[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable”); Minn. Stat. § 572.08 (“[A] provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable”). The language in the lease shows that the parties agreed to arbitrate apportionment only if (1) the condemnor did not make an award to Gillette and (2) Gillette and Rasoir could not agree in writing on the apportionment of an award made solely to Rasoir. In eminent domain cases, Minn. Stat. § 117.085 provides that separate awards must be made to Rasoir and Gillette if Rasoir so requests. Thus, the issue that the parties agreed to arbitrate, i.e., apportionment, has not yet arisen and, if Rasoir asks the commissioners to apportion the award, by the operation of the Minn. Stat. § 117.085 it cannot arise.

Finally, appellants argue that the FAA preempts Minn. Stat. § 117.085; they rely on *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) for this argument. *Concepcion* concerned AT&T’s attempt to avoid class-action arbitrations with a clause in its customer contracts providing that disputes between the customer and AT&T would be arbitrated and that the customer must bring claims individually, not as a member of a class. *Id.* at 1744. It holds that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA” *id.* at 1748, but also overrules California caselaw that allowed any party to a consumer contract to demand classwide arbitration and concluded that class arbitration resulting from this law was inconsistent with the FAA. *Id.* at 1750-51.

These issues have little if any relationship to the lease between Rasoir and Gillette with its provision that, if a condemnation award was made only to Rasoir and Rasoir and Gillette could not agree on its apportionment, the apportionment would be arbitrated, and nothing in *Concepcion* indicates that a state legislature may not establish a process for determining owners' and lessees' condemnation damages.

Because the arbitration provision in the parties' lease is subject to conditions precedent which have not occurred, and because Minn. Stat. § 117.085 clearly makes the apportionment of condemnation awards between landowners and lessees the duty of the court-appointed commissioners upon the request of the owner, we conclude that the district court lawfully denied the motions to compel arbitration.

Affirmed.