EFiled: Jun 23 2015 07:42AM EDT
Filing ID 57443147
Case Number 221,2015D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BON AYRE LAND LLC, a Delaware Limited Liability Company,	:	
Appellant,	:	No. 221-2015
v.	:	Appeal from the Superior Court in and for Kent County C.A. No. K14A-08-001 WLW
BON AYRE COMMUNITY ASSOCIATION,	:	
Appellee.	:	

APPELLANT'S OPENING BRIEF

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DATED: June 23, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

This appeal involves a recently enacted statute dealing with the newly mandated "Rent Justification" legislation for manufactured housing communities rent increases. 25 Del.C. §7040, *et seq.* (The "Act"). The Appellant herein is Bon Ayre Land LLC (hereinafter "Bon Ayre"), which owns a small manufactured home community in Smyrna, called Bon Ayre. The Appellee, Bon Ayre Community Association, (hereinafter "BACA" or the "Association") purports to represent all manufactured homeowners in Bon Ayre who lease lots from the Appellant.

The initial statute, a copy of which is attached hereto as Exhibit "A", which is applicable in this appeal,[1] provided that to increase rents above the current CPI, the community owner must meet one of the seven (7) factors set forth in 25 Del. C. § 7042(c) for justifying such rent increase The factor designated "Market Rent", 25 Del. C. §7042(c)(7), is the one at issue in this case.

Under the Act, "market rent" can justify a rent increase above the statutory CPI baseline if a community owner demonstrates that its rent increase either equals or is below the market rent, which is defined in the Act to mean: "that rent which would result from market forces absent an unequal bargaining position between the

[1]The Statute was slightly amended by an amendment that was signed by the Governor on July 15, 2014, which does not effect this Appeal.

community owner and the home owners." 25 Del.C. §7042(c)(7). In other words, the current rent that a community owner charges new tenants that are in an equal bargaining position and are free to accept it or reject it. Market rent can also be proven by showing the "rents charged by comparable manufactured home communities in the applicant's competitive area." 25 Del.C. §7042(c)(7).

In accordance with the requirements of the Act, after notice of the rent increase, two unsuccessful meetings were held with the affected tenants in accordance with §7043(b). Thereafter, the Association requested Arbitration before an attorney selected by the Manufactured Homes Relocation Authority. The two requests were consolidated and arbitration was held on May 28, 2014.

The arbitrator's decision of June 12, 2014, attached hereto as Exhibit "B" was appealed to the Superior Court by Bon Ayre. BACA did not file a cross appeal. The appeal to the Superior Court , pursuant to the Act, sought the Court's review of the record created at the arbitration proceeding and the Court's determination that the Arbitrator had erred in not granting the requested rent increase of $379 for all the affected tenants under the "market rent" provision of the Act.[2]

The Superior Court decided that the Act was constitutional but did not review

[2]The initial statute that is applicable provides that "the appeal shall be on the record without a trial *de novo*."

the record to decide the merits of the appeal, or if the Arbitrator had erred in not deciding that Bon Ayre had met its burden of proof that the "market rent" or the comparables justified the requested rent increase. Instead, the Superior Court ruled that the required meetings with the tenants were not in accordance with 25 Del. C. § 7043(b) of the Act, despite the fact that BACA had so stipulated and conceded. Therefore, the Superior Court ruled no increase above the CPI was permitted. A copy of the Superior Court's decision is attached hereto as Exhibit "C". Bon Ayre's motion for reargument was denied and a copy of the Court's decision is attached hereto as Exhibit "D".

Bon Ayre appealed the Superior Court decision to this Court. Since this is a case of first impression, this Court's standard or scope of review is not clear. If this appeal is treated the same as an appeal from an Administrative Agency, this Court scope of review is to directly examine the decision of the Arbitrator. *Connell v. Baker*, 488 A.2d 1303 (Del. 1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378 (Del. 1999). Otherwise, this Court would review the Superior Court's decision *de novo*. This is Appellant's Opening Brief.

SUMMARY OF THE ARGUMENTS

I. THE LOWER COURT ERRED IN FINDING THE RENT JUSTIFICATION ACT TO BE CONSTITUTIONAL

II. THE ARBITRATOR ERRED IN EXCLUDING THE TESTIMONY OF APPELLANT'S EXPERT, WHICH WAS RELEVANT AND ADMISSIBLE EVIDENCE

III. THE ARBITRATOR ERRED IN NOT COMPLYING WITH THE LEGAL DOCTRINE OF COLLATERAL ESTOPPEL AS TO FACTUAL FINDINGS IN A PRIOR ARBITRATION DECISION

IV. THE ARBITRATOR'S DECISION WAS CONTRARY TO THE LAW AND THE EVIDENCE

V. THE LOWER COURT ERRED IN FINDING THAT APPELLANT HAD NOT COMPLIED WITH §7043(b) DESPITE APPELLEE'S STIPULATION TO THE CONTRARY AND THE ARBITRATOR'S RULING

STATEMENT OF FACTS

Appellant's first witness, Richard Draper, is Bon Ayre's site manager who also resides in Bon Ayre. He testified that he had been site manager for 14 years and dealt with tenants ' problems "almost every day" and that he deals with all "community issues" including "maintenance" and coordination of activities, *etc.* (Transcript of arbitration hearing, Page 31) (hereinafter T. p.) A1. He further testified that:

> Bon Ayre is a very friendly community. Very neighborhood oriented people. People look after each other. They have planned and organized a lot of different activities at the community building, many of them private clubs of groups that invite the entire community to their affairs. (T. p. 32, A-1)
>
> We are in the Town of Smyrna. We have all town services, water, sewer, trash collection, town police protection. Even though we're a private organization, or private community, we still have a lot of activities within the community just for the benefit of the residents.. . . They are very wide streets allowing for parking on the streets. There are water connections for fire hydrants. Sidewalks. (T. p. 33, A-2)

He explained that the houses are well cared for and "you would not know that they were manufactured." (T. p. 34, A-2) He testified Bon Ayre is located:

> ". . . in Smyrna, of course, . . . directly across from U.S. 13 from a major shopping center with supermarkets, drug stores, restaurants, easily within walking distance." (T. P. 35, A-2)

There are two drug stores "within 2 blocks" and the tenants are "close to two different (medical) facilities'" Bay Health and Christiana Care. (T. p. 36-37, A-2-3)

He then compared the eight (8) comparables that were located in Bon Ayre's competitive area and described the photos that were admitted and testified as follows:

> "Wild Meadows is four miles to Bay Health. And because you have to drive through downtown Dover with many stop lights, it's a 15 to 20 minute drive. It's located near the Dover Speedway and Music Festival." He explained that during events such as the Fire Fly, they are: "frozen in the community until the event is over." (T. p. 38, A-3) Rent is $438.75, T. p. 147, A-66)
>
> "Barclay Farms is five miles to Bay Health Hospital and depending on traffic, a 15 - 20 minute drive. It's located in a commercial industrial area west of Wyoming on Route 10." (T. p. 39, A-3) . . . The streets are narrow streets that you can't park on. They have no sidewalks, no curbs and no storm drains. No fire protection. Base Rent is $456 per month. (T. pgs. 56-57, A-7-8)
>
> Southern Meadows: ". . . is 8.8 miles to Kent County General. And it's 20 to 25 minutes drive because it is driving through downtown Dover with stop lights. It's in a very rural area. It's 2.3 miles west of the small village of Magnolia, and basically in the farmland. It was divided from originally being all trailer parks into two sections, one Southern Meadows which is 55 and older and the other is still the trailer park." (T. pgs. 39-40, A-3). Very narrow street with houses shown on both sides close to the street with no sidewalks or curbs or storm drains. It shows one of the vacant lots that is flooded, what looks like rain water from the street washing into the street. The base rent is $470 per month. (T. pgs. 57-58, A-8)
>
> Beechwood: Basically, a trailer park showing single wide trailers. Beat up looking houses. One looks like the roof is gone. This is a list of the houses that are currently offered for sale there. One is $9,900. Rent is $418 per month. (T. p. 58, A-8)
>
> Twin Maples: It's also a trailer park showing single wides. Narrow streets in close proximity of the trailer units to each other. Dilapidated

> looking house. Looks like it has been abandoned. Very small house, small trailer with again, significant damage to the unit. Rent is $405 per month. (T. p. 58-59, A-8)
>
> Dover East Estates: This is a dilapidated looking trailer with overturned tables in front. Total lack of, apparently any maintenance of the unit. . . . accumulated trash that has been piled at the curb or the street, no curb. Rent is $387 to $410 per month. (T. p. 59, A-8)
>
> Kings Cliffe Mobile Park: It shows pictures of trailers and their close proximity to each other. Again, propane tanks. Trash out in the street. Another picture of a trailer close to the street. Picture of a trailer up on blocks with no skirt going around it. Rent is $375 to $425 per month. (T. p. 60, A-8)
>
> Village Park is a trailer park with single wides – pictures of trailer. Pictures of narrow streets in close proximity to each other. Other scene of the trailer spacing which is very close to each other. (T. p. 62, A9)(Rent ranged from $542 to $636).[3]

He described all the facilities in Bon Ayre including a "large community building. All kinds of different clubs meet there. They have line dancing there. They have dinners there. And they have different clubs that sponsor different events." He explained that the tenants have their own key and have 24 hours a day seven days a week access to the community building with an exercise room, great room, four televisions, library, shuffle board, grilling patio and lots of open space, and access to a fully equipped kitchen." (T. p. 47, A-5) He also testified that the tenants can use

[3]As will be discussed hereafter that was the testimony of Bon Ayre's appraiser's expert witness. (T. p. 120, A11)

it for their private parties and the tenants are allowed to borrow "chairs or tables" for their personal use. He also testified that there is a stocked "fishing pond with a fountain" and "people fish there quite frequently. (T. p.47, A-5)

Mr. Draper explained the value and benefit of "curbing and fire hydrants" (which no other community has with maybe one exception) - that there is "no muddy mess" because of curbing and fire hydrants that "help your insurance rates." (T-49. 50, A-6) A list of at least 17 clubs that use the community center was admitted, Exhibit 26, (A-12), as were pictures of Bon Ayre and the tenants' numerous activities. As to the present rent that Bon Ayre charges, he testified: "for a one-year lease it's $379 per month. For a nine-year lease, it's $369 with escalation yearly." (T. p. 53, A-7)

Bon Ayre's next witness was Donna Finocchiaro, who is employed by Lenape Properties and collects the rents and deals with the tenants. She testified she has a relationship:

> . . . with quite a few of them. If they have a problem or if need answers to questions, they'll call me I'll help them as best I can. If I don't know, I'll try to find out for them. (T. p. 88, A-13)

She explained that Bon Ayre has "never" evicted anyone ever since even some that are way behind on their rent. "I have one that is close to $8,000." (T. p. 89, A-14)

Ms. Finocchiaro also testified that the standard rent is "$379 for a one-year

lease." (T. p. 90, A-14)

Bon Ayre's next witness was a real estate appraiser, James Rostocki, that had done a market study and looked at comparable communities and their facilities, *etc.* and wrote a report with his expert opinion as to the market rent for Bon Ayre lots. Although his report was produced prior to the hearing BACA's attorney objected to his testimony not because Mr. Rostocki's testimony concerning his findings and opinion were not relevant or that he was not qualified but solely because it did not "exist" prior to the meeting with the tenants. Mr. McGiffin stated "it's not that they did not disclose it. It did not exist. That's the problem." (T. p. 103, A-17) The meeting with the tenants was held on March 7 and April 8, 2014. The report was dated May 22, 2014.

However, after reading the report, the Arbitrator upheld Mr. McGiffin's objection and ruled that Mr. Rostocki's opinion as to market rent and the pages of the report that discussed "definitive" value conclusion including his opinion that Bon Ayre rent should be $465 were not admissible because his report and his opinion as to market value "should have been disclosed at the time of the meeting" with the tenants. (T. p. 105, A-18) However, the Arbitrator stated that the rest of the report was "very probative and remarkably helpful" and he, therefore, allowed into evidence the Table of Contents and the discussion of the differences between Bon Ayre and

the other communities. (T-105, A-18) (The excluded portion of Mr. Rostocki's report-A-19 - A-27; and the admitted portion-A-28 - A-56).

Mr. Rostocki testified and explained that he had conducted a "market rent study" which is part of what he does as an appraiser and explained how he did that and the properties he selected as comparables based on the site improvements and amenities. (T. p. 116, A-58). He explained why location was important.

> The location of a property is probably the most important thing that drives the value of the property. The reason the location drives the value would be its convenience. Ultimately, people are living there and the property is convenient to shopping, employment centers, transportation routes, historically has dramatic effect on values of properties. (T. p. 117, A-59)

He explained that the primary things that "would drive value" and market rent was:

> . . . the location of the property, what is included in the rent, the site improvements and the amenities. So if you are asking me what was superior and inferior of the comparables that we looked at, the subject property was superior in terms of site improvements because the subject property appeared to have some of the wider streets and sidewalks, which although some of the other properties had different variations of site improvements, some of them did have wide streets, some of them did have off street parking, street lights and what not. The subject property would be considered superior to all of the comparables solely in the category of site improvements. (T. p. 119, A-59)

He testified that the rent that the four comparables charged was from $438.65 to $573 and that Village Brook, one of the comparables he used, the rent actually

ranged from $542 to $636. "So the average rents of the four properties that we conducted the survey on was $484.16 with a median value of $462.50." (T. pgs. 120-121, A-59-60)

He testified that his study considered the amenities that each community had, which make them superior as compared to Bon Ayre and taking all these into account came up with the market rent. (Of course, he was not allowed to testify as to his findings or opinions as contained in A-19 - A-27).

Mr. Rostocki explained how he selected four communities as comparables. He eliminated what he called "trailer parks." However, the Arbitrator would not allow him to answer the following questions:

> So would it be fair to say if a slummish trailer park is charging $420, then a first class vastly superior project like Bon Ayre certainly should be charging at least that much, if not more? (T. p. 114, A-58)

The undersigned argued that was an "obvious observation" but the Arbitrator responded "if it is obvious don't you think I can make that jump." (T. p. 115, A-58)

On cross-examination he explained how he went about comparing the communities and making adjustments for various differences and amenities. He explained that they were not identical but they were similar in many aspects and superior in some other aspects and his adjustments of any differences. (T. p. 121-135, A60-A63)

BACA's first witness was Fred Neil who lived in Wild Meadows, a 55 plus community and was president of the homeowners association since 2004. He purchased his house for $150,000 in 2003 and paid rent of $300 per month. (T. p. 139, A-64) He testified that there is a pool and large clubhouse with various activities, and there is no fee. He testified there is a coordinator who arranges for various activities but they pay the cost of same. The landlord provides lawn care only. Presently, the rent is $438.75. (T. pgs. 144-147, A-65-66) He confirmed that for the very same services in 10 years his rent was increased by $138. (T. pgs. 150-151, A-67) He testified that he goes to the clubhouse about once a month for community meetings, or for a Ravens football game. He does not go there for any activities. (T. p.153, A-68)

Jill Fuchs then testified that she has been a resident of Barclay Farms, also a 55 plus community for 10 years and the rent has increased from $355 to the present rent of $458. (T. p. 157, A-69) She testified about the clubhouse and activities and the pool. She testified they have a "pool party" and free "lawn care." (T. p. 162-163, A-70) They also receive some minor maintenance help not to exceed "20 minutes." (T. p.164, A-70)

On cross, she testified she was president of the homeowners association. As to location when asked if she had to travel at least 15 minutes to go to the hospital,

she responded that "the fire department will come with their ambulance." (T. p. 169, A-72) She admitted however that it is located in a rural area and therefore, it takes about 15 minutes to go where she wants to go. (T. p. 170, A-72) She has a one-year lease and admitted that despite the $103 increase in rent, she got the same things she received 10 years ago. (T. p. 170, A-72)

Richard Dick was the only Bon Ayre tenant involved in this rent increase that testified. He testified he purchased his house in Bon Ayre for $105,000. He chose not to go to Barclay Farms because he and his wife had no interest in a pool and the two "big factors"were lawn care which he did not want and as to a social director: "I could not understand why at my age why I would need to have somebody plan my day or what have you." (T. p. 176, A-73)

Milton Stroup then testified about the men's club in Bon Ayre, where he resided and the various activities they sponsored, and items such as a card table or grill that they donated, *etc*. He then showed pictures of an area where the grass was not cut, *etc*. (T. p. 184-193, A-75-78) On cross he testified he purchased his house for $79,000 and admitted that at a previous arbitration he testified that Bon Ayre's rent was "50 to 75 dollars less than anybody else" except that now he said that he had "estimated." (T. p. 193, 194 A-78)

Joan Peculski the president of BACA testified about the certificate of

incorporation and that only the members who pay dues can vote and attend their parties. (T. p, 200, A-79) She testified that the streets are swept every other week because of her efforts with the Town. (T. p. 201, A-80) On cross, she admitted that Bon Ayre provided "security" but she wanted the security to start later and talked to the guard about it. (T. p. 205, A-81) She also admitted that they requested and obtained a fence separating Bon Ayre. (T. p. 206, A-81) She then read a testimonial about Bon Ayre that she wrote which in part stated:

> We also now have a community center complete with exercise equipment, and there is a different daily activity, sometimes even two or three on one day from which to choose, be it crocheting, cards or line dancing, there is always something for everyone. The homes are well constructed and you get a lot of home for your money. The sales staff is courteous and take pride in maintaining their land and common areas. Bon Ayre is a lovely community with a rural setting, but yet, has all of the convenience of big city living, shopping center, malls, medical facilities, hospitals, all of which are so important to a senior client. And the community is a perfect size where neighbors look out for one another. (T. pgs. 207-208, A-81)(Exhibit 37[4])

Finally, BACA introduced a short video of some of the sites that Mr. McGiffin took while driving by.

[4]Exhibit 37 (A-82) contained two additional testimonials but the Arbitrator ruled that was hearsay and not admissible.

ARGUMENT

I. THE RENT JUSTIFICATION ACT IS UNCONSTITUTIONAL, INCONSISTENT AND UNWORKABLE

Question Presented

Whether the Rent Justification Act is unconstitutional? (Preserved in A88)

Scope of Review

The issue presented in this appeal is one of law, which is subject to plenary or de novo review by this Court. *Connell v. Baker*, 488 A.2d 1303 (Del. 1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378; (Del. 1999)

Merits of Argument

The lower Court erred in its ruling finding the Act to be constitutional.

The Rent Justification Act is an extraordinary infringement on constitutionally protected property rights and can be viewed as an unjust taking and must be strictly construed in favor of the property owner.

The Act denies the parties due process in that it does not provide for subpoena power and the compulsory attendance of witnesses, while at the same time doing away with the relaxation of evidentiary rules which has been the practice in arbitrations.[5] On

[5]The Superior Court ruling that the Act was not an unconstitutional taking and did not require a jury trial will not be pursued or contested in this appeal.

the contrary, the Act requires that "the Delaware Uniform Rules of Evidence" shall be used as a guide by the Arbitrator for admissibility of evidence . . ." §7043(d). In fact, in this case, the Arbitrator made it clear that he would require:

> . . .evidence shall be entered into the record in accordance with the Delaware Uniform Rules of Evidence. Expert testimony shall be offered in accord with Article VII. Hearsay shall not be offered except with Article VIII. (Exhibit 10, A-86)

Without subpoena power, the application of the Rules of Evidence is not only inconsistent, but also denies a party, especially the party with the burden of proof i.e., the landlord, the ability to satisfy its burden and due process. If the trier of fact was a judicial officer or Board such as the Industrial Accident Board for instance, the parties would have access to compulsory attendance of witnesses.

The application of the hearsay exclusion will deprive the Landlord of a fair hearing and due process and did so in this case. For example, to establish comparable rent at Village Creek, Bon Ayre offered an affidavit from its owner as to the rent it charges for a double wide house. BACA objected that it was hearsay and the Arbitrator ruled: "it is hearsay. And I think the witness had ample opportunity, no disrespect to you sir to contact Village Brook and determine it for himself." (T. P. 64, A-9)[6]

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[6]The Arbitrator's ruling is perplexing because he seems to be saying that an affidavit by the owner is hearsay but obtaining the information by a phone call to the office and repeating what an unknown person stated is not hearsay.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Due process includes the right to present witnesses. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

In *Ward v. Tishman Hotel, et al.*, C. A. No. 10C-02-170 WCC (Nov. 10, 2010), Judge Carpenter recognized that compulsory process was essential for a fair trial and due process and therefore, he dismissed a case on the grounds of *forum non conveniens* in part because of the inability of the Court to compel the attendance of witnesses.

The Act is also inconsistent in that it provides for "non-binding arbitration" that in fact is binding unless reversed on appeal. If the arbitration is non binding as in the former Superior Court Rule 16 arbitrations, then the decision can be ignored and is only binding if both parties agree to accept it. That is not what this statute provides which is clearly inconsistent. To compound the harm, the trier of fact or judicial officer in the "non-binding" but binding arbitration is an attorney with ADR training, but without any other qualifications. In this case the Arbitrator was an elected official.[7]

There are other inconsistencies and vagueness with the statute which are not applicable in this appeal.

[7]The arbitrator, Ciro Poppiti, III, is the elected Democrat Register of Wills of New Castle County.

II. THE ARBITRATOR ERRED IN EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE

Question Presented

Whether the arbitrator erred in excluding the Appraiser's report? (Preserved in A17-A18)

Scope of Review

The issue presented in this appeal is one of law, which is subject to plenary or de novo review by this Court. *Connell v. Baker*, 488 A.2d 1303 (Del. 1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378; (Del. 1999)

Merits of Argument

The Arbitrator erred in excluding the Appraiser's report and his testimony.

In accordance with the statute, Bon Ayre relied on market rent to justify the increase in rent. Market rent can be proven by the present rent that a community charges or by comparables. Bon Ayre relied on the current rates that are being charged new owners who enter into a lease in arm's length transactions as well as comparables. Market rent can also be established by an appraiser doing a value market study.

Bon Ayre notified the Arbitrator and BACA's attorney prior to the hearing that it intended to have James Rostocki testify as an expert witness at the hearing and produced a copy of his May 22, 2014 report, (Exhibit 8, A-89). Initially, BACA's

attorney objected to Mr. Rostocki "on relevancy grounds" (Exhibit 9, A-90) but the Arbitrator ruled that "James Rostocki may testify as an expert witness." (Exhibit 10, A-86) Nevertheless, he then ruled that although the report was "very probative and remarkably helpful" he could not testify about his findings or opinions or any reference to a "definitive" value conclusion, but only because his report was not "disclosed" to the tenants at the time of the meeting even though it did not exist at that time.

Such a novel and punitive approach to evidence is not supported by the statute. The tenants were informed that the increase in rent was based on market rent and comparables and were given the comparable information. There was no claim whatsoever that there was any prejudice. Mr. Rostocki was an additional piece of evidence in support of Bon Ayre's position. The statute is seeking to assure that manufactured home community owners receive a "just, reasonable and fair return on their property." The statute was clearly not intended to allow a "gotcha" defense. In fact, it must not be forgotten that the rent justification statute is an extraordinary infringement on constitutionally protected property rights and as such must be strictly construed in favor of the property owner.

Moreover, the statute makes it clear that this Court must consider the entire record that was offered - not at the meeting but at the arbitration hearing. The Arbitrator erred in not admitting the appraiser's full report and opinion as to market value.

III. THE ARBITRATOR ERRED IN NOT COMPLYING WITH THE LEGAL DOCTRINE OF COLLATERAL ESTOPPEL

Question Presented

Whether the Arbitrator erred in not complying with the legal doctrine of Collateral Estoppel? (Preserved in A84 and A104)

Scope of Review

The issue presented in this appeal is one of law, which is subject to plenary or de novo review by this Court. *Connell v. Baker*, 488 A.2d 1303 (Del. 1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378; (Del. 1999)

Merits of Argument

The Arbitrator erred in not complying with the legal doctrine of Collateral Estoppel.

At a prior arbitration hearing Bon Ayre's justification was based not only on market rent and comparables it was also based on an increase in operating expenses especially a substantial increase in mortgage payments. However, as to market rent and comparables, the evidence was exactly the same as in this hearing except that instead of live testimony the same witnesses testified by affidavits as to Wild Meadows and Barclay Farms. At the prior arbitration, the Arbitrator, John Grady, Esquire, found that based on comparables Bon Ayre could be charging $400 or so per month. In fact Mr.

Grady stated:

> "I do find that Bon Ayre did meet its burden to demonstrate that there were 'similar' facilities, services, amenities and management which could be compared. Virtually all of those facilities are charging $375.00 to $450.00, including the 55 and older communities." (Exhibit 15, A-96)

Even though BACA argued that some comparable communities had more amenities or services such as a pool or social director, etc., Mr. Grady found that:

> "Even if all of those facilities do not exactly provide the same services as Bon Ayre (some provide more, some provide less), it does appear that across the board all of those facilities were charging, on average, over $400.00 per month." (A-97)

As stated in *Foltz v. Pullman, Inc.*, 319 A.2d 38 (Del.Super. 1974) collateral estoppel bars the "relitigation of a factual issue which was litigated and decided in the prior suit between the same parties or persons in privity with them."

The Arbitrator erred in not ruling that pursuant to collateral estoppel the finding in the prior arbitration as to comparables was binding since the issues were identical, the parties were the same, Bon Ayre and BACA, and BACA had a full and fair opportunity to litigate the issue of comparables and it was litigated on its merits.

IV. THE ARBITRATOR'S DECISION WAS CONTRARY TO THE LAW AND THE EVIDENCE

Question Presented

Whether the Arbitrator's decision was contrary to the law and the evidence? (Preserved in the Notice of Appeal to the Superior Court)

Scope of Review

The issue presented in this appeal is one of law, which is subject to plenary or de novo review by this Court. *Connell v. Baker*, 488 A.2d 1303 (Del.1985); *Public Water Supply Company v. DiPasquale, et al.*, 735 A.2d 378; (Del. 1999).

Merits of Argument

The Arbitrator's decision was contrary to the law and the evidence.

As stated, the Rent Justification Act provides that a landlord can increase the rent if it is in accordance with the "market rent." Market rent can be shown by the current rent being charged to new tenants who obviously are not in ":an unequal bargaining position" since they can walk away if they wish. The testimony was clear and undisputed that Bon Ayre's current rent is $379 per month and on that basis alone the rent increase is justified. Market rent can also be established through expert testimony of a market study of the competitive area. Bon Ayre's expert, James Rostocki, a real estate appraiser did such study and found that the proper market rent

for Bon Ayre lots was $465 per month but as previously discussed that testimony was not admitted. Mr. Rostocki's study and qualifications were not questioned and the relevancy of his study and his findings in part as contained in his report except for his opinions as to market rent were admitted. In fact, the Arbitrator noted that his report was "remarkably helpful." BACA's sole argument in opposition to the report and Mr. Rostocki's testimony was that the report "did not exist" when the meeting with the tenants was held on March 7, 2014. The Arbitrator upheld the objection and ruled that it was not admissible because it was not "disclosed" to the tenants at the meeting. As previously argued that ruling was erroneous and this Court should consider Mr. Rostocki's report and opinion that the Bon Ayre lots' market value or rent is $465. Mr. Rostocki's report alone if admitted as to market value would justify an increase in rent to $379.

A third avenue to establish market rent is the use of comparable communities in the competitive area. At the outset, the parties stipulated or agreed that comparable evidence would be sufficient to justify the increase and the Arbitrator agreed to honor the parties' agreement and decide the case accordingly. As stated in the Arbitrator's letter of May 18, 2014:

> The parties have agreed that if Landlord can prove a comparable market rent, then Landlord wins. In other words, by proving one factor alone, Landlord wins.

> I am not going to disrupt what the parties have agreed to. And I will make my final decision in accordance with their logic. (Exhibit 6, A-103)

However, that is not what the Arbitrator did as he expressed in his decision. He initially erred by totally ignoring the undisputed and overwhelming evidence that at least six inferior communities including "slummish" and vastly inferior trailer parks charged from $400 to $625 per month as indicated below:

Beechwood:	$418
Twin Maples:	$405
Dover East Estates:	$387 to $410
Kings Cliffe:	$375 to $425
Village Park:	$542 to $636
Southern Meadows	$470 (also inferior but has a pool).

At the hearing, the Arbitrator seemed to agree that it was "obvious" that if "slummish" communities charge much more than $379, then certainly Bon Ayre can charge $379 or more.

However, in his decision he considered only Barclay Farms (which charges $456) and Wild Meadows (which charges $438.75) and ignored the inferior communities as if they were not comparable because they were inferior. If inferior communities cannot be considered comparable then Bon Ayre would never be able to avail itself of the market rate justification, as it would never be able to compare its community with an inferior community unless it allowed its community to also

become inferior. It simply cannot be the case that the Act would be interpreted in such a perverse manner that would force a community to degrade itself. The Legislature could not have intended such an illogical result.

The two communities that were referred to by the Arbitrator as comparable had a pool and social director and larger community centers, and provided lawn care, but otherwise were inferior to Bon Ayre especially as to location and convenience of same but charged $58 to $77 more than $379. The Arbitrator conceded that Bon Ayre was superior in its location and that "the first law of real estate [is] 'location, location, location.'" That superiority alone was more than enough to even out a pool. The security that Bon Ayre provided and the others did not provide can easily balance a social director. Those adjustments were correctly made by the expert but were ignored by the Arbitrator.

In fact, the only affected Bon Ayre resident that testified, Mr. Dick, made it clear he wanted nothing to do with a pool or social director. The fact is that no Bon Ayre tenant has expressed any interest in a pool and Bon Ayre tenants are so active that they certainly do not need a social director. Such amenities are not necessarily of any value to the tenants as is the case with Mr. Dick who testified he had no interest in a pool or a social director. In fact, the witness that testified as to Barclay Farms made it clear he never went to the community center (or the pool) except for

homeowner association meetings or to watch Raven football games. Bon Ayre has promoted and succeeded in having a community where the tenants join together in various activities and "your neighbor is your friend" which is Bon Ayre's slogan is a valued plus.

Although it was clear and undisputed that the comparables clearly demonstrated that the increase to $379 was justified and although the Arbitrator agreed that he would honor the parties' agreement that comparables alone would justify the increase, he did not abide by his commitment to honor the parties' agreement. The Arbitrator discussed other irrelevant issues totally unrelated to the parties' agreement and stipulation. For example, the Arbitrator noted that there was no evidence that other communities had such a rent increase. The statute does not require such a showing and again that violates the parties' stipulation and the Arbitrator's commitment to honor the stipulation. Moreover, the evidence did show that 10 years ago, Wild Meadows rent was $300 and now it is $438.75, an increase of $138.75. Ms. Fuchs testified that Barclay's rent 10 years ago was $355 and now it is $458, an increase of $103.

The affected tenants bought a house in Bon Ayre 10 years or so ago because the rent was $50 to $75 less than the other 55 and over communities as testified to by BACA's Vice President, Mr. Stroup. Ten years later, with everything being the same,

(amenities, services, location, *etc.* except that Bon Ayre now provides costly security), the difference in rent is actually more than \$50 to \$75 less. Nevertheless, Barclay Farms now charges \$456 and Wild Meadows charges \$438.75. Consequently, with everything being equal, Barclay Farms charges \$77 more and Wild Meadows charges \$58 more than the \$379 that Bon Ayre is seeking to charge. Southern Meadows which except for a pool is clearly inferior to Bon Ayre in presently charging \$470 which is \$91 more than the \$379 Bon Ayre is seeking to charge. The difference between Bon Ayre rent is still at least "\$50 to \$75 less than anybody else" as Mr. Stroup testified when he purchased his house. Mr. Stroup chose Bon Ayre because it was \$50 to \$75 less and it still is. In fact, now it is \$77 to \$91 less than the other three over 55 communities, namely Barclay Farms, Wild Meadows and Southern Meadows.

Without any factual support and again in violation of the parties' stipulation the Arbitrator arbitrarily decided that only a \$30 increase is justified for the tenants that had a nine (9) year lease and were paying \$309 with no rent increase for three (3) years, but for tenants who were paying \$349 their rent was increased to \$379 the current market rent. If \$379 is the justified current market rent for some tenants, why is it not for the other tenants who already benefitted by having a nine year lease with no increase for the last three (3) years? The statute dealt with market rent justification across the board and not on an individual basis. Obviously, if \$379 was justified as

the market rent for 3 tenants, it necessarily had to be justified for the other tenants.

Ruling that $379 is justified for some tenants only is neither logical nor reasonable and not in compliance with the mandate of the statute. The issue is whether the increase in rent to $379 as a result of market rent as determined by current rent and comparables is justified, not whether it is justified for some tenants and not the others. The statute does not allow for individualization of tenants in determining what is justified.

The Arbitrator also erred in not complying with the parties' agreement as to tenants with premium lots who had agreed to pay a $40 premium.

The statute is clear that on appeal, the Court's obligation is to determine by a preponderance of the evidence whether the record created in the arbitration justifies the proposed rent increase in excess of CPI-U. The evidence is abundantly clear if not overwhelming that Bon Ayre has met its minimal burden of proof (more likely than not) that $379 is justified pursuant to the statute.

ARGUMENT

V. APPELLEE STIPULATED THAT APPELLANT HAD COMPLIED WITH §7043(b) AND THE SUPERIOR COURT ERRED IN RULING OTHERWISE.

Question Presented:

Whether the appellee stipulated that appellant had complied with 25 Del. C. § 7043(b) and whether the Superior Court erred in ruling otherwise? (Preserved in A83-A84)

Scope of Review

The issue presented in this Appeal is one of law, which is subject to plenary or *de novo* review by this Court. *Connell v. Baker*, 488 A.23d 1303 (Del. 1985).

MERITS OF ARGUMENT

The Appellee stipulated that Appellant had complied with 25 Del. C. §7043(b) and the Superior Court erred in ruling otherwise.

At the very outset, beginning with the initial telephone conference with the Arbitrator, BACA's attorney agreed and conceded that the only issue to be decided by the Arbitrator was "comparables". As expressed by the arbitrator in his letter of May 18, 2014:

> "The parties have agreed that if Landlord can prove a comparable market rent, then Landlord wins. In other words, by

> proving one factor alone, Landlord wins.
> I am not going to disrupt what the parties have agreed to. And I will make my final decision in accordance with their logic." (Exhibit 6, A-103).

That same agreement and concession by BACA's attorney was also expressed verbatim by the arbitrator in his decision at page 5:

> "Mr. McGiffin then flatly stated that if Mr. Ramunno could prove comparable market rent, Landlord wins."

At the beginning of the arbitration hearing, BACA's attorney confirmed on the record that BACA agreed that the meetings were in accordance with the requirements of 25 Del. C. §7043(b) of the Act:

> Arbitrator Poppiti: Do the parties agree a meeting was held in accordance and pursuant to Title 25, Delaware Code, §7043(b).
>
> Mr. McGiffin: Yes. Two meetings because it is two groups, but yes.
>
> Mr. Ramunno: Yes. There were two meetings.
>
> Arbitrator Poppiti: Great. I will then, and I will state for the record, I made some notes on the sheet that I circulated. I'll make a copy of this at an appropriate time for the parties right after the hearing. And I will enter this what I would call Stipulated Facts in as Exhibit 14. (T. pgs. 16-17, A-83-84).

Exhibit 14 contains the parties' stipulation that Bon Ayre had complied with §7043(b).

Relying on BACA's stipulation and concession, Bon Ayre did not introduce any

evidence concerning the meetings nor did BACA's attorney ask any questions of Bon Ayre's witnesses concerning the meetings. However, at the end of the hearing, and after Bon Ayre had excused its witness, BACA's attorney for the first time argued that the meetings were not in accordance with 25 Del. C. §7043(b).

Based on the BACA agreement and stipulation, the Arbitrator refused to consider BACA's contention that Bon Ayre had not complied with the requirements of 25 Del. C. §7043(b). Moreover, the Arbitrator in his decision expressed his displeasure and discussed at length BACA's failure to honor its stipulation and its tactics of raising it after Bon Ayre had released its witness.

In his decision, the Arbitrator stated:

> "I give this argument no consideration. Given the circumstances to consider this argument would be to unfairly prejudice Landlord."

The Arbitrator explained that:

> On May 7, I conducted a telephone conference between Mr. McGiffin and Mr. Ramunno. Mr. McGiffin immediately stated that he was going to make a challenge on the validity of the §7043(b) meeting. At which point, Mr. Ramunno countered saying that Landlord was only going to argue comparable market rent and that, in fact, comparable market rent was discussed at the meeting. Mr. McGiffin said okay and my own sense from Mr. McGiggin was that if Landlord was *only* going to argue comparable market rent, then the 7043(b) meeting was valid. I chimed in warning Mr. Ramunno of the dangers or arguing only one factor. Mr. McGiffin then flatly stated that if Mr. Ramunno

could prove comparable market rent, Landlord wins.

The Arbitrator then discussed that Mr. McGiffin had ample opportunity to "mention" a "challenge to the 25 Del. C. §7043(b) meeting" but did not do so.

The Arbitrator referred to the fact that BACA stipulated that the meetings were in accordance with 25 Del. C. §7043(b):

> "The morning of the hearing I circulated via email a "Stipulated Facts" sheet. The last fact reads: A meeting between the parties was held pursuant to 25 Del.C. §7043(b). I wrote that fact specifically because I thought the validity of the §7043(b) meeting was settled."

The Arbitrator then stated:

> Mr. Ramunno's first witness was James Draper, the Bon Ayre caretaker. Mr. Ramunno did not ask anything about the §7043(b) meeting because Mr. Ramunno was of the impression that there was no issue with the §7043(b) meeting.
> On cross, Mr. McGiffin had the opportunity to ask Mr. Draper about the §7043(b) meeting. Mr. McGiffin did not.
> Mr. Ramunno was under the reasonable impression that the §7043(b) meeting was settled. I write that the impression was "reasonable" because, in fact, I held that same impression.
> Had Mr. Ramunno been aware of the challenge to the §7043(b) meeting, he would have presented his case differently: HE would have, for example, delved into the §7043(b) meeting with Mr. Draper. Mr. Ramunno would also not have released Mr. Draper until the end of the hearing, in case Mr. Draper had to rebut testimony from those present at the §7043(b) meeting.
> It was the reasonable impression of Mr. Ramunno (and myself) that the §7043(b) meeting was settled. Mr. McGiffin had ample opportunity ti dispel that impression. He did not.

BACA's attorney's contention that he had only agreed that a meeting had taken place and not that the meeting was in accordance with 25 Del. C. §7043(b) is disingenuous and would render the Stipulation a nullity. Unless there was a meeting, there would be no arbitration. In fact, BACA's attorney's request for an arbitration states:

> A meeting to discuss the rent increase was held on March 7, 2014 at the Model Home on the premises of Bon Ayre Community and was deemed unsuccessful as the dispute between the leaseholders and the community owner could not be resolved to everyone's satisfaction. (Part of Exhibit 1, A-106).

As stated by the Arbitrator it was undisputed that BACA's attorney agreed, stipulated and conceded that Bon Ayre had complied with 25 Del. C. §7043(b). Nevertheless, the Superior Court ruled otherwise. The lower court ruled:

> The plain reading of the stipulation - "[a] meeting between the parties was held pursuant to 25 Del.C. §7043(b)" - is not sufficiently unequivocal to serve as a judicial admission for anything other than the fact that a meeting took place.

The Court did not consider that in addition to the stipulation and the initial agreement, *etc*., BACA's attorney made the following judicial admission at the beginning of the hearing on the record:

> "Arbitrator Poppiti: Do the parties agree a meeting was held in accordance and pursuant to Title 25, Delaware Code 7043(b).

> Mr. McGiffin: Yes. Two meetings because it is two groups, but yes. (TP 16-17, A-83-84)"

According to Webster's Dictionary "accordance" is an "agreement with a thing. It connotes "agreement, concord, harmony." It does not mean or connote a dispute.

The lower Court cites *Merritt v. Ousted Parcel Ser.,* 956 A.2d 196 (Del. 2008) in support of its decision. However, this Court in *Merritt* clearly stated that the Appellee is barred by its stipulation or admission. . . .

> Unless the Court can find an absolute demonstration from other evidence in the case or from facts within judicial notice . . . that under no circumstances could the averments and admissions be true.

Such a finding of an "absolute demonstration" is not possible under the facts and circumstances of this case.

The Arbitrator's finding that BACA had agreed and stipulated that the meeting was in accordance with the statute was explained and justified by the Arbitrator at length and the Court erred in finding otherwise. The Arbitrator was present and heard the initial agreement and the judicial admissions and the conduct of the parties, and ruled accordingly. There was ample, if not undisputed evidence to support the arbitrator's decision that BACA had stipulated that the meetings were in accordance with 25 Del. C. §7043(b).

CONCLUSION

The evidence clearly demonstrates in several ways and for several reasons that the rent increase Bon Ayre is seeking is justified and that the Arbitrator erred in not granting the requested rent increase for all the involved tenants. The Court should also find that the statute is inconsistent and unworkable and needs to be corrected for the Act to function in a fair and reasonable manner as intended by the Legislature.

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