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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CITY OF SOUTH GATE, Plaintiff and Respondent, v. S&M AUTO SALES, Defendant and Appellant.	B231345 (Los Angeles County Super. Ct. No. BC380303)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Michael B. Montgomery for Defendant and Appellant.

Alvaradosmith, Keith E. McCullough, Kevin A. Day, and Gregory G. Snarr for Plaintiff and Respondent.

S&M Auto Sales (S&M) appeals from a judgment denying its claim for compensation for loss of business goodwill in this condemnation action brought by the City of South Gate (South Gate). Following a bench trial, the trial court concluded that S&M failed to prove by a preponderance of the evidence that it was entitled to compensation for loss of goodwill under the prerequisites of Code of Civil Procedure section 1263.510.[1] We conclude that S&M's challenges to the trial court's determination are not well taken, and thus we affirm the judgment.

STATEMENT OF FACTS AND OF THE CASE

I. The Eminent Domain Action

On November 7, 2007, South Gate filed a complaint in eminent domain to acquire property located at 4861 Firestone Boulevard (the property) for "the construction and development of the Firestone Boulevard/Atlantic Avenue Intersection Improvement Project." When the complaint was filed, the property was owned by Salvador Jauregui (Salvador) and Norma Jauregui (Norma), who are not parties to this action, and leased by their daughter Monika Jauregui (Jauregui), doing business as S&M.[2]

On June 30, 2009, South Gate sought an order for prejudgment possession of the property. The proceedings were temporarily halted in July 2009, when Norma filed a voluntary bankruptcy petition and listed the property as one of her assets. On November 3, 2009, the bankruptcy court granted South Gate's motion for relief from the automatic stay to allow the city to proceed with the eminent domain action, and on November 16, 2009, the superior court granted South Gate's request for an order to take prejudgment possession of the property. The order authorized South Gate to take possession of the property 31 days after service of the order (i.e., on December 17, 2009).

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

[2] Jauregui began leasing the property in September 2007, and began selling used cars and trucks on the lot in October 2007.

Because Jauregui had not relinquished possession of the property by December 17, South Gate sought and obtained an additional order directing the sheriff to enforce the terms of the prejudgment order, including by removing vehicles from the property, if possession was not transferred by December 21, 2009. Accordingly, on about December 20, 2009, Jauregui moved her business from the property to 400 East Manchester (Manchester location). She moved solely because the court ordered her to do so. The Manchester location was much smaller than the property, requiring Jauregui to sell some of S&M's inventory at a loss.

II. The Present Action for Compensation for Lost Business Goodwill

After vacating the property, Jauregui sought compensation for lost business goodwill. The parties were unable to agree on the amount of lost goodwill for which S&M was entitled to be compensated, and thus the issue was tried to the court on November 1 and 2, 2010. Jauregui testified on her own behalf and called business appraisal expert Dave Girbovan, who testified that S&M suffered lost goodwill as a result of the forced relocation to the Manchester property. South Gate called Jauregui and Girbovan under Evidence Code section 776, as well as relocation expert Jesse Ortiz. Neither S&M nor South Gate introduced into evidence an expert appraisal of S&M's lost business goodwill.

On January 4, 2011, the court entered judgment for South Gate. In its statement of decision, the court stated that S&M had failed to meet its burden of proving lost goodwill under section 1263.510, explaining as follows:

"1. Code of Civil Procedure section 1263.510(a) ('Section 1263.510(a)') provides, in pertinent part: '(a) The owner of a business conducted on the property taken . . . shall be compensated for loss of goodwill if the owner proves all of the following: (1) The loss is caused by the taking of the property . . . . (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill. (3) Compensation for the loss will not be included in payments under Section 7262 of the

Government Code. (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.'

"2. The property owner, S&M Auto Sales, has the burden to prove, by the preponderance of the evidence, each of the four prerequisite conditions for compensation set forth in Section 1263.510(a). *City of Santa Clarita v. NTS Technical Systems* (2006) 137 Cal.App.4th 264, 269-270; *Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 367-368.

"3. Whether the conditions for compensation have been met is a matter for the trial court to resolve. 'Only if the court finds these conditions exist does the remaining issue of the value of the goodwill loss, if any, go to the jury.' *Ibid*., 137 Cal.App.4th 264 at [270].

"4. For purposes of Section 1263.510(a), '"goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage.' Code of Civil Procedure section 1263.510(b).

"5. S&M is a dba of Monika Jauregui ('Monika'). Monika signed a lease for the property located at 4861 Firestone Boulevard (the 'Jauregui Property') in South Gate in September 2007 and obtained a business license in October 2007 to sell automobiles at the Jauregui Property.

"6. S&M moved from the property in December 2009 because the City had obtained from this court its Further Order Allowing Enforcement of Order for Prejudgement Possession, filed herein December 17, 2009 (the 'Possession Order'). The court's issuance of the Possession Order was the only reason S&M vacated the Property. Upon vacating the Property, S&M moved to 400 East Manchester (the 'Relocation Property').

"7. Prior to moving to the Relocation Property, Monika looked for other sites by driving around the area of the Property, but found no sites comparable to the Property. Monika spent three days following the time she became aware of the Possession Order looking for a property to relocate to.

"8. This court issued its statement of decision in the right to take trial, finding in favor of South Gate and against S&M on March 3, 2009. At this point in time, S&M had exhausted all legal challenges to the constitutionality of South Gate's eminent domain action and knew, or should have known[,] that there were no impediments to South Gate moving forward with its project on the Jauregui Property.

"9. On November 16, 2009, this court granted South Gate's motion for possession of the Jauregui Property. The court's order stated that South Gate was going to take possession on the 31st day after service of the order, which took place on November 16, 2009. [Internal record reference omitted.]

"10. In her supplemental response to Interrogatory No. 41 which was verified by her and served on July 1, 2008, Monika stated that S&M was formulating a strategy regarding relocation should it be necessary, which S&M intended to implement, including based upon rulings it receives on its right to take and/or other legal challenges. [Internal record reference omitted.] This indicates that Monika was aware of the need for a relocation strategy as early as July 1, 2008 and that she was, in fact, formulating one. In fact, during 2007 and 2008, she made no efforts to identify relocation sites.

"11. Monika for the first time began to seek a relocation property on December 17, 2009 and found the Relocation Property between December 17 and December 20, 2009. She looked at no other sites.

"12. In her trial testimony, Monika was unable to recall the number of cars sold by S&M at the Jauregui Property in either 2007 or 2008. Monika further testified that S&M did not prepare or maintain profit and loss statements, income statements, cash flow analyses, or budgeting documents.

"13. S&M's business appraisal expert, Dave Girbovan ('Girbovan') testified that he used the seller's discretionary earnings methodology to determine if S&M had goodwill at the Jauregui Property and its value. This method involves determining the business's gross profit by subtracting the cost of goods sold from the net sales and then subtracting [the] operating expenses which results in 'seller's discretionary earnings,'

which represents the funds remaining in the business after all expenses and costs have been paid. Fixed assets are then deducted to find the goodwill of the enterprise.

"14. S&M's actual cost of goods sold for each vehicle sold by it in 2007 and 2008 is reflected in the 'deal jacket' for the purchase of the vehicle. S&M's tax returns for 2007 and 2008 were prepared using the 'deal jackets' for all cars sold in the pertinent calendar year. However, for reasons unexplained at trial, while all of the 2007 and 2008 'deal jackets' were produced during discovery, Girbovan was not given the 'deal jackets' prior to preparing his expert report or giving his expert deposition in this case.

"15. In reaching his opinion regarding whether there was good will, Girbovan utilized the sales numbers for 2008 as they appeared in the tax return, but did not utilize the costs of goods numbers reflected in the 2008 tax return. Rather, he divided costs of goods into two components, cost of vehicles and refurbishing costs and as to each component, calculated a different number than that reflected in the 'deal jackets' and the tax returns.

"16. With respect to the cost of vehicles, Girbov[a]n performed a margin analysis of a handwritten list of S&M sales transactions for a three month period in 2008, which handwritten list had been prepared by Monika and her mother. In his trial testimony, Girbovan asserted that his margin analysis resulted in a cost of goods margin of 78.6% which he then applied to the tax return sales figures from 2008 to determine the cost of vehicles. The cost of goods sold margin reflected in the 2008 tax return was 92%.

"17. With respect to the cost of refurbishment component of cost of goods for 2008, Girbovan did not utilize the actual cost of refurbishment reflected in the 'deal jackets,' which he had not been provided, or the tax returns, but did an analysis of tax returns from a separate dealership at a different location to develop a 'refurbishment adjustment.' Girbovan conceded that in developing this 'refurbishment adjustment' he did not ask anyone affiliated with S&M whether the percentage he calculated was accurate, whether the cars sold at the separate dealership were similar to the cars sold by S&M, or whether S&M's refurbishment costs were detailed in its records. Girbovan testified, when informed that actual refurbishment costs for each vehicle sold are

reflected in a line item on the 'deal jackets,' that he should have reviewed and considered the S&M 'deal jackets.'

"18. Exhibit 133 is a chart reflecting Girbovan's valuation of S&M's goodwill 'in the before condition' based on calendar year 2008 operations. In his trial testimony, Girbovan testified that if the actual cost of goods sold reflected in the 2008 tax return is utilized, rather than Girbovan's cost of vehicle margin analysis and refurbishment adjustment, the resulting seller's discretionary earnings is a negative number which Girbovan further testified indicates that S&M had no goodwill at the Jauregui Property.

"19. The court finds by a preponderance of the evidence, based on the testimony received at trial, that it is not reasonable to utilize Girbovan's cost of vehicle margin analysis or his refurbishment adjustment in determining whether S&M had goodwill at the Jauregui Property because the actual costs of vehicles and refurbishment were reflected in the S&M 'deal jackets' and in the S&M tax returns. Rather, the court finds by a preponderance of the evidence that utilizing the seller's discretionary earnings methodology with the actual cost of goods sold as reflected in the tax returns and the 'deal jackets,' instead of the cost of vehicle margin analysis and refurbishment adjustment which Girbovan employed, is a more reasonable and accurate basis for determining whether S&M had goodwill at the Jauregui Property. As noted above, Girbovan testified that with these changes, the seller's discretionary earnings methodology employed by him as reflected in Exhibit 133 results in a negative seller[']s discretionary income which, in turn, indicates an absence of good will. Thus, the court finds by a preponderance of the evidence that S&M had no goodwill at the Jauregui Property and therefore lost no goodwill as a result of the taking of the Jauregui Property by South Gate and has therefore failed to meet its burden pursuant to Code of Civil Procedure section 1263.510(a)(1). On this basis alone, judgment must be for South Gate and against S&M.

"20. As a separate and independent basis for finding that S&M had no goodwill at the Jauregui Property, the court further finds that with respect to Girbovan's cost of vehicle margin analysis and his refurbishment adjustment, he has relied upon a goodwill

valuation methodology that does not value S&M's actual business but instead values a hypothetical business operating at S&M's facility. Thus, under *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, 1118, Girbovan's expert testimony is inadmissible as being without sufficient foundation and speculative and there is no admissible evidence that S&M had goodwill at the Jauregui Property and lost goodwill as a result of the taking of the Jauregui Property by South Gate.

"21. Based upon the court[']s findings as reflected in Paragraph Nos. 6 through 12 hereof, the court finds by a preponderance of the evidence that S&M has failed to meet [its] burden of proving that any loss of good will could not have been reasonably prevented by a relocation of S&M and adopting procedures that [a] reasonably prudent person would take and adopt in pursuing good will as required by Code of Civil Procedure section 1263.510(a)(2)."

Notice of entry of judgment was served on January 5, 2011. S&M timely appealed.

DISCUSSION

S&M contends that the trial court abused its discretion by excluding Girbovan's expert opinion testimony. S&M also contends that the trial court erred in concluding that S&M had not established that it (1) lost goodwill as a result of the move, or (2) acted reasonably in relocating to the Manchester location. We consider these issues below.

I. Applicable Legal Standards

"Historically, lost business goodwill was not recoverable under eminent domain law. [Citation.]" (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 (*Coyne*).) Believing this unjust, the Legislature in 1975 enacted section 1263.510 in order "to provide monetary compensation for the kind of losses which typically occur when an ongoing . . . business is forced to move and give up the benefits of its former location." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36

Cal.3d 263, 270.) "Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right. . . . [¶] . . . [I]f the owner of a business being conducted on the property taken establishes certain preconditions, he or she is entitled to compensation for the loss of goodwill that results from the taking." (*Coyne, supra,* at p. 1522.)

Section 1263.510 sets forth the prerequisites for an award of compensation for loss of business goodwill in eminent domain proceedings, as follows: "The owner of a business conducted on the property taken, or on the remainder if the property is part of a larger parcel, shall be compensated for loss of goodwill if the owner proves all of the following: [¶] (1) The loss is caused by the taking of the property or the injury to the remainder. [¶] (2) The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill. [¶] (3) Compensation for the loss will not be included in payments under Section 7262 of the Government Code. [¶] (4) Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner." (§ 1263.510, subd. (a).) Section 1263.510 defines goodwill as "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage." (§ 1263.510, subd. (b).)

"Compensation for loss of goodwill in eminent domain proceedings 'involves a two-step process. Whether the qualifying conditions for such compensation [citation] have been met is a matter for the trial court to resolve. Only if the court finds these conditions exist does the remaining issue of the value of the goodwill loss, if any, go to the jury. [Citations.]' (*City of Santa Clarita v. NTS Technical Systems* (2006) 137 Cal.App.4th 264, 269-270, fn. omitted.) 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' ([*Inglewood Redevelopment Agency v. Aklilu* (2007)] 153 Cal.App.4th [1095,] 1107.) Where, as here, the entitlement to business goodwill is disputed, 'the determination of that dispute, including the resolution of any disputed factual issues, is

for the trial court.' (*Emeryville Redevelopment* [*Agency v. Harcros Pigments, Inc.* (2002)] 101 Cal.App.4th [1083,] 1119.)" (*Coyne, supra*, 168 Cal.App.4th at pp. 1522-1523.)

II. The Trial Court Did Not Abuse Its Discretion by Excluding the Valuation Testimony of S&M's Expert Witness

Pursuant to Evidence Code section 801, the opinion testimony of an expert witness is admissible only to the extent that it is based on matter "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Subd. (b).) The trial court is required to exclude expert opinion testimony if it concludes that the testimony is "based in whole or in significant part on matter that is not a proper basis for such an opinion." (Evid. Code, § 803.) In ruling on the admissibility of expert opinion testimony, the court enjoys broad discretion. (See *City of San Diego v. Sobke* (1998) 65 Cal.App.4th 379, 395.) Hence, we review for abuse of discretion S&M's claim that the court erred in excluding Girbovan's testimony. (*Ibid*.)

Section 1263.510 does not provide any guidance as to how the value of lost goodwill should be calculated. Consequently, "the courts have recognized that 'there is no single method by which to measure goodwill' [citation] and that '"'[e]ach case must be determined on its own facts and circumstances . . . .'"' [Citation.] Nevertheless, the evidence presented to a jury regarding lost goodwill '"'must be such as legitimately establishes value'"' [citation] and 'generally represents the present value of the anticipated profits of the business.' [Citations.] In other words, while there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual* value and cannot be based on hypothetical or speculative uses of a condemned business. [Citations.]" (*Redevelopment Agency of San Diego v. Mesdaq, supra,* 154 Cal.App.4th at p. 1129.)

In its statement of decision, the trial court said that it excluded Girbovan's testimony because Girbovan failed to demonstrate that his methodology for valuing lost

goodwill was based on a fair estimate of S&M's actual value, rather than the value of a hypothetical business operating on the property. For the following reasons, the court's exclusion of this testimony was not an abuse of discretion.

Girbovan testified that he calculated lost business goodwill by subtracting "cost of goods sold" (composed of "cost of vehicles" and "refurbishing costs") from "net sales." S&M's tax returns for the relevant years reflected "net sales" of $1,733,666 and "cost of goods sold" of $1,598,647. But while Girbovan used the "net sales" figure reported on the tax returns to calculate lost goodwill, he did not use either the reported "cost of goods sold" figure or the actual "cost of vehicle" and "refurbishing costs" reflected on the "deal jackets" maintained by S&M for the relevant period. Instead, he assumed that the "cost of goods sold" was $1,438,943 ($159,704 less than reported on the tax returns), which he determined by (1) calculating the "cost of vehicles" for a three to five-month period and then projecting that cost over the remaining nine to 12 months, and (2) assuming that S&M's reconditioning costs were the same as those of a similar but unrelated used car lot owned by Salvador and Norma. Girbovan conceded that he never asked S&M for its actual refurbishing costs (records of which the business apparently maintained), and never asked anyone at S&M whether the other car lot sold similar cars.

Girbovan testified that he made adjustments to the reported "cost of goods sold" because "there were problems with the cost of goods sold number; there were problems with the beginning inventory numbers; there were problems with the ending numbers. It didn't accurately track the cost of the vehicles." Girbovan never explained what these problems were, however, or how his methodology corrected the problems.

Further, Girbovan did not establish any industry support for the methodology he adopted. The sole testimony in this regard was as follows:

"[The Witness:] This is a book that's widely recognized in the appraisal profession called 'Valuing Small Businesses and Professional Practices," by Shannon Pratt, Robert Riley and Robert Weiss. . . . Chapter 8 is devoted to justifying the income statement. One part of Chapter 8 is adjustments for cost of goods sold, noting that inventories can be different, noting that accounting practices vary significantly one year

to the next and even within the same company. And that cost of goods sold adjustments are part of the adjustments that can be made to normalize an income statement and valu[e] a business.

"The Court: But did you find any of those things, that there had been changes in the valuation, that there had been change in the accounting?

"The Witness: Yes.

"The Court: With respect to S&M?

"The Witness: Yes. The beginning and ending inventory. There was beginning and ending inventory in 2007. There was no beginning and ending — sorry. Beginning and ending inventory in 2008.

"The Court: Okay. Go ahead.

"Q: . . . [D]id the methodology you used comply with the text that you have referred to [*Valuing Small Businesses and Professional Practices*]?

"A: Well, the fact that adjustments are necessary, yes, they only get into a couple minor adjustments, but —"

Taken as a whole, Girbovan's testimony suggests that cost of goods sold adjustments can be appropriate in some circumstances, but does not establish that the particular adjustments he made in this case were consistent with the text he cited or with any other accepted industry approach. Further, Girbovan never explained why his methodology, which relied on cost *estimates*, more accurately reflected S&M's costs than did the deal jackets, which reflected *actual* vehicle and refurbishing costs. Finally, while it is true, as S&M suggests, that courts have at times permitted experts to estimate future anticipated profits, it cites no cases for the proposition that an expert may reject actual cost data in favor of hypothetical cost data.

"As one appellate court has observed, 'There is a limit to imaginative claims . . . . To say that only the witness' valuation opinion has probative value, that his "reasons" have none, ignores reality. His reasons may influence the verdict more than his figures. To say that all objections to his reasons go to weight, not admissibility, is to minimize judicial responsibility for limiting the permissible arena in condemnation trials. The

responsibility for defining the extent of compensable rights is that of the courts.' (*Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed* [(1963) 215 Cal.App.2d 60,] 69.)" (*Sobke, supra,* 65 Cal.App.4th at p. 396.)

Although Girbovan was not required to use any specific methodology in valuing goodwill, nothing in the case law or statutory authority cited suggests that his methodology accurately evaluated loss of goodwill. Hence, the trial court acted within its broad discretion in excluding Girbovan's expert opinion testimony. (Evid. Code, § 803.) Further, because S&M's claim for lost goodwill was based entirely on Girbovan's testimony, on this record S&M was not entitled to any compensation for lost goodwill. The trial court thus properly entered judgment for South Gate.

III. S&M's Contentions Are Without Merit

S&M contends that, for at least five independent reasons, the trial court erred in striking Girbovan's appraisal and entering judgment for South Gate. None of these contentions has merit:

1. S&M contends that the trial court was required to award compensation for lost goodwill because South Gate "conceded loss of goodwill damages" in an appraisal prepared by its own expert. We do not agree: Whatever the contents of the South Gate's appraisal may have been, neither party introduced it at trial, and thus the appraisal could not have supported an award for S&M.

2. S&M contends that South Gate did not extend relocation services to it, and thus "[a]ny duty of S&M to actively pursue relocation was obviated by [the] CITY's utter failure and refusal to perform its obligations under [the] relocation statutes and rules." Whatever the factual merits of this contention might be, it is legally irrelevant. Under section 1263.510, subdivision (a), S&M was required to prove *both* that it suffered a loss as a result of the taking of the property *and* that the loss could not reasonably be prevented by a relocation of the business. Because S&M did not establish that it suffered lost goodwill as a result of the taking, its asserted justification for failing to timely seek an adequate relocation site has no bearing on its right to recover.

3. S&M contends that Girbovan's opinion should have been admitted because the "discretionary earnings methodology" on which he relied "is an accepted methodogy." Perhaps so, but the court did not exclude Girbovan's opinion because it was based on a discretionary earnings methodology. Instead, as discussed above, the court excluded Girbovan's opinion because it relied on inaccurate cost estimates.

4. S&M contends that the trial court struck Girbovan's appraisal because Girbovan did not review the deal jackets before preparing it. Not so: The court never had the opportunity to "strike" (or to admit) Girbovan's appraisal because S&M never offered it into evidence. Further, the court's exclusion of Girbovan's opinion was unrelated to his review of the deal jackets.

5. S&M contends that the trial court erred in concluding that Girbovan's use of "comparative market data" was not reliable because "[s]uch a methodology is accepted." S&M is correct that comparable market data has been appropriately relied on in some circumstances, but suggests no reason why the court was required to accept it here, when *actual* cost data was readily available.

DISPOSITION

The judgment for the City of South Gate is affirmed. The City shall recover its costs on appeal.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.