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## ComEd to pay \$1.3M for construction delays

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ComEd must pay \$1.31 million in damages to a real estate company for delays and costs caused to its construction project by a power line, a state appellate panel held.

A panel of the 1st District Appellate Court ruled that the real estate company sufficiently established its lost profits and escalation costs. However, it declined to award the company prejudgment interest.

Justice Rena Van Tine delivered the judgment of the court.

Shepherd Real Estate Subsidiary, LLC — 1901 Halsted Series sued ComEd in Cook County Circuit Court for trespass.

It alleged that a live ComEd power line running under its property at 1901 North Halsted Street caused a 22-month delay and increased the cost of constructing an apartment building.

Shepherd alleged that the easement for the power line had expired in 1945 and ComEd refused to relocate it.

Following a bench trial, Judge Thomas More Donnelly entered judgment in Shepherd's favor on its trespass claim and awarded more than \$1.31 million in damages, including more than \$1.11 in lost profits and more than \$126,000 in escalation costs.

ComEd appealed, arguing that the evidence of those

damages was speculative and that the “new business rule” — which provides that a new business must establish lost profits with reasonable certainty — barred recovery of lost profits.

Shepherd cross-appealed, arguing that Donnelly erred in ruling that prejudgment interest was not available on its trespass claim.

In the panel's non-precedential Rule 23 order, filed Wednesday, Van Tine wrote that Donnelly correctly awarded Shepherd for lost profits.

She noted that Shepherd established its lost profits through its witness Michael Nathan Brock, an expert in construction delay and damages evaluation.

Brock estimated lost profits by using the Multiple Listing Service (MLS) to approximate reasonable rental rates for each of the building's units.

Through MLS, Brock found 24 comparable apartments in Lincoln Park and Old Town and testified that the total lost income for 2021 and 2022 amounted to more than \$1.49 million.

“Brock's method meets our supreme court's standard for proving a new business's lost profits: ‘evidence of revenues of a similar product or a similar business’ — in this case, similar apartments — ‘in a similar market’ — in this case, nearby neighborhoods,” Van Tine wrote, citing *Ivey v. Transunion Rental Screening Solutions, Inc.*, 2022 IL 127903.

Van Tine rejected ComEd's argument that the “new business rule” bars Shepherd from recovering lost profits for a new apartment building, writing that the Supreme Court of Illinois “has explained that ‘there is no inviolate rule that a new business can never prove lost profit,’ citing *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 248 (2006).

“The building is located between Lincoln Park and Old Town, two neighborhoods with well-established residential real estate markets,” she wrote. “It was proper for Brock to use the surrounding established residential real estate markets to estimate Shepherd's lost rental income on 1901 North Halsted.”

Further, Van Tine rejected ComEd's arguments that other factors — such as the COVID-19 pandemic, removal of a storage tank under the property, and difficulties obtaining permits from the city — may have also contributed to the project's 22-month delay.

Van Tine also wrote that Donnelly correctly awarded Shepherd escalation costs based on Brock's estimate, noting that they were “based on real-world invoices from Shepherd's contractors and a historical cost estimation tool of undisputed reliability.”

She also affirmed Donnelly's ruling that Shepherd was not entitled to prejudgment interest, noting that the parties did not have a recov-

ery agreement and that Shepherd settled its ejection claim which sought equitable relief, among other reasons.

Justices Jesse G. Reyes and Debra B. Walker concurred in the judgment.

Brandon R. Freud and Adam K. Beattie of Chuhak & Tecson, P.C. represented Shepherd.

“We are pleased the First District made the right decision in affirming the trial court's seven-figure damages award entered against ComEd for trespassing on our client's property and thereby substantially delaying construction of its building,” Freud said in an email. “The lawsuit allowed our client to complete construction and add another quality apartment building to the city of Chicago.”

Joseph P. Kincaid of Swanson Martin & Bell LLP represented ComEd. He could not be reached for comment.

“ComEd is disappointed with the appellate court's ruling,” ComEd spokesperson Lauren Huffman said in a statement. “As the grid operator for northern Illinois we work closely with developers and stakeholders throughout the region to minimize any impact our existing infrastructure may have on new construction sites, while ensuring continued reliability for our customers.”

The case is *Shepherd Real Estate Subsidiary, LLC - 1901 Halsted Series v. Commonwealth Edison Co.*, 2024 IL App (1st) 221766-U.