

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 108 North Main Street, SBL No. 57.31-2-5; to effectuate the Village's Urban Renewal Plan.

**DECISION/ORDER**

Index Nos:  
4853/08

Motion Date:  
12/05/10

-----X  
In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 110 North Main Street, SBL No. 57.31-2-4 and 114 North Main Street, SBL No. 57.31-2-3 to effectuate the Village's Urban Renewal Plan.

Index Nos:  
9013/08

-----X  
In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 132 North Main Street, SBL No. 57.13-1-52, to effectuate the Village's Urban Renewal Plan.

Index Nos:  
2064/09

-----X  
**LaCAVA, J.**

The following papers numbered 1 to 12 were considered in connection with these motions, consolidated for consideration on the Court's own motion, by Village of Spring Valley (Village) seeking certain disclosure in these several associated matters:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBITS	2
REPLY AFFIRMATION	3
GOOD FAITH AFFIRMATION	4
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	5
AFFIRMATION IN OPPOSITION/EXHIBITS	6
REPLY AFFIRMATION	7
GOOD FAITH AFFIRMATION	8
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	9
AFFIRMATION IN OPPOSITION/EXHIBITS	10
REPLY AFFIRMATION	11
GOOD FAITH AFFIRMATION	12

Petitioner/condemnor Village commenced the instant petition to acquire by eminent domain certain real property, including those parcels known as and located at 108 North Main Street, Spring Valley, New York, otherwise denominated on the Tax Map of the Village of Spring Valley as Section 57.31, Block 2, Lot 5 (and otherwise known as SBL No. 57.31-2-5); 110 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.31-2-4; 114 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.31-2-3; and 132 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.13-1-52. Said properties were previously owned by Reynold Cherisol; The Portuguese-American Community Center, Inc.; and Leonid Sandler, respectively, and are known, respectively, as the Cherisol, Portuguese-American, and Sandler properties. In a Decision and Order dated August 29, 2008, the petition granting a taking of these properties by eminent domain was granted. Fee and fixture claims have subsequently been made as to each of the properties.

The Village now moves for disclosure, alleging that said disclosure is material and necessary for defense of the aforementioned claims. In particular, the Village alleges that claimant has failed, despite repeated requests, to provide information related to the several claims, including the date of installation of the various fixtures; the manner in which they were installed; the identity of the party or parties performing the

installation; and the subsequent operation, modification (if any), and maintenance of the fixtures. Notably, the fixture claims with respect to the three fee claims (namely, Cherisol, Portuguese-American, and Sandler), are for 32 fixtures; 561 and 413 fixtures; and 97 and 95 fixtures, respectively. Claimants oppose the motion, asserting, *inter alia*, that the Village does not contest ownership of the fixtures; that depositions would inordinately prolong the matter or be a burden on claimants, and that the sought discovery is not material since all proof of value at trial in a condemnation must be by way of appraisal. The Village points out in Reply, however, that it does, in fact, contest ownership for a significant number of the fixtures arguing that since their installation would be necessary for the fee owners to obtain a Certificate of Occupancy, the fee owners, and not the fixture claimants herein, must have owned and installed them. Alternately, the Village contests their status of some of the fixtures arguing that since they are moveable, they are personalty and may not be classified as fixtures. Furthermore, the Village argues that scarce judicial resources will be saved, and not wasted, by disclosure of such information prior to trial during discovery, rather than at the trial itself. Finally, it notes several decisions, including one of this Court, which have approved depositions in condemnation matters.

#### **DISCOVERY IN CONDEMNATION PROCEEDINGS**

CPLR 3101 (a) provides:

a) **Generally.** There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine,

dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

CPLR 3101 (a).

However, it is well-established that proceedings commenced pursuant to EDPL Article 5 are Special Proceedings as provided-for in CPLR Article 4, and thus are governed by the discovery rules set forth in CPLR § 408 (*Matter of the City of New York [Jones Woods Park Addition]*, 2008 NY Slip Op 51839U [Supreme Court, Kings County, 2008]; cf. *CMRC Corporation v. State of New York*, 270 A.D.2d 27 [1<sup>st</sup> Dept. 2000]).

CPLR § 408 provides

§ 408. Disclosure. Leave of court shall be required for disclosure except for a notice under section 3123.

As this Court noted in *Matter of Rockland County Sewer District #1*, 13 Misc. 3d 1226A (Supreme Court, Rockland County, 2006), hereinafter - RCSD #1,

Discovery of information pursuant to C.P.L.R. § 408 which is material and necessary in preparing for trial [ e.g., preparing a trial ready appraisal ] is appropriate in... eminent domain proceedings....

Contrary to claimants' argument that disclosure, particularly depositions, in condemnation matters is disfavored, numerous cases support discovery on the issue of value. For example, in *Bay Islip Associates v. State of New York*, 285 A.D.2d 522 (2d Dept. 2001, and cited in RCSD # 1), while the Court limited interrogatories seeking "...information which is appropriately provided in the appraisal to be filed by the claimant...and is otherwise readily available...", it recognized that disclosure devices such as interrogatories were available to a party in a condemnation matter.

That disclosure is in fact at times appropriate in cases of taking by eminent domain, is made most clear in *White Plains Urban Renewal Agency v. 56 Grand Street Associates*, 47 A.D.2d 536 (2d Dept. 1975), also cited by Justice Dickerson in RCSD #1, involving the use of a deposition notice by the condemnor. The trial Court had vacated the notice; the Appellate Division modified to permit the deposition on a limited number of subjects, stating

Pretrial disclosure may be allowed in a condemnation proceeding when warranted by the circumstances of the case and in the interest of justice.... In our opinion, pretrial disclosure will facilitate the ultimate determination as to the fair and just compensation to be paid to the owner for the taking from it of the subject property. The material sought is both material and necessary...The information sought by the condemnor in this case is necessary to assist it in the preparation of a proper appraisal report.

(see also, *Matter of City of New York*, supra; *Matter of American Telephone and Telegraph Company*, 85 A.D. 2d 816(3d Dept. 1981).

No one seriously contests that disclosure of details relating to the original cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures herein is material to the valuation of the claimed fixtures. Notably, the Court herein has been required to preside over an extensive fixture trial (seven days before this Court, in addition to three days before Justice Dickerson), during which it became apparent that only 112 of the 174 fixture items alleged to have been compensable by claimant were in fact compensable (see, *G & T Restaurant Corp. v. Village of Port Chester*, 19 Misc.3d 1123(A) [Supreme Court, Westchester County, 2008]). The Court determined in that matter that the appraiser's value conclusion far exceeded the Court's award (by approximately \$350,000.00, or more than double), due largely to the appraiser's failure to inquire of the fixture claimants about whether the items had been purchased or installed by claimant (G & T Restaurant Corp.), or by its landlord, and by the appraiser's failure to determine that many of the items claimed to be compensable in the G & T fixtures trial had, in fact, previously been the subject of claims and awards, or were determined to be personalty, in the prior fee valuation trial relating to the subject property.

The Village seeks to inquire, at an oral examination, in each the fixture claims in these three associated matters, of the former fee owners thereof, and the various trade fixture claimants, regarding the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable. Inquiry as to these matters, and as to these matters alone, would inevitably assist the trier of fact to properly value the compensable fixtures, and at the same time would reduce the need to inquire and/or present proof about those items which are not compensable, for whatever reason, at trial. Thus, said inquiry is material and necessary. And such inquiry would not delay an impending trial in any of these matters, since, to date, no notes of issue have been filed, nor have trial dates been set.

However, the Village has failed to make the case that the discovery device of the taking of depositions upon oral questions is necessary to such inquiry, rather than a less intrusive disclosure method such as the service of interrogatories. Notably, in RCSD #1, this Court favored inquiry by interrogatories, although a limited deposition on several issues, some unrelated to valuation, was permitted (*see also, Bay Islip Associates, supra*). Consequently, as a matter of discretion, the Court will allow the service by condemnor of interrogatories, upon the former fee owners of the parcels at issue here, and the various trade fixture claimants related thereto, with respect to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable.

Based on the foregoing, it is hereby

**ORDERED**, that the insofar as condemnor seeks leave of Court pursuant to CPLR §408 to demand depositions pursuant to CPLR § 3107, said relief is denied, and it is further

**ORDERED**, that the insofar as condemnor seeks leave of Court pursuant to CPLR §408 to seek disclosure from claimants as set forth above, said leave is granted, solely to the extent that it is

**ORDERED**, that condemnor is granted leave to serve upon the former fee owners of the parcels at issue here, and the various trade fixture claimants related thereto, Interrogatories, pursuant to CPLR §3130, the subject of said Interrogatories to be limited to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures

alleged herein to be compensable, and the motion is in all other respects denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York  
January 26, 2011

---

**HON. JOHN R. LA CAVA, J.S.C.**

Lawrence A. Zimmerman, Esq.  
Hiscock & Barclay, LLP  
Attorney for the Village of Spring Valley  
50 Beaver Street  
Albany, New York 12207

Philip A. Sanchez, Esq.  
Goldstein, Goldstein, Rikon & Gottlieb, PC  
Attorney for Junie Cherisol and Pierrilus Siliana, El Torero  
Restaurant, Inc. And PC Taxi Services, LLC  
80 Pine Street, 32<sup>nd</sup> Floor  
New York, New York 10005-1702