

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

**FILED AND
ENTERED ON
DATE**

**ROCKLAND
COUNTY CLERK**

-----X
In the Matter of the Application of
ROCKLAND COUNTY SEWER DISTRICT NO. 1

To acquire title to certain real property
necessary for the project known as the
WESTERN RAMAPO SEWER EXTENSION PROJECT
Relating to the following Tax Map Section,
Block and Lots in the Town of Ramapo:
57.07-1-01 and 54.07-1-01.01.

Index No. 7427/04

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MURIEL T. BOONE,

DECISION & ORDER

Claimant,

-against-

ROCKLAND COUNTY SEWER DISTRICT NO.1

Condemnor.

-----X
DICKERSON, J.

FILING A NOTE OF ISSUE IN EMINENT DOMAIN PROCEEDINGS

The Condemnor, Rockland County Sewer District No. 1
[" RCSD "] brought a motion, pursuant to 22 N.Y.C.R.R. §
202.21(e), seeking an Order vacating the Note of Issue and

Certificate of Readiness filed by the Claimant Muriel T. Boone, " together with costs and expenses pursuant to 22 NYCRR §130-1.1 ". For the reasons set forth below the Condemnor's Motion is granted to the extent that Claimant's Note of Issue and Certificate of Readiness is vacated.

Factual Background

The Condemnor acquired Claimant's real property located along Old Route 17 in the Village of Hillburn, New York by condemnation on or about January 28, 2005 as part of RCSD's sewer expansion project. The acquisition was made pursuant to this Court's January 21, 2005 Order of Acquisition. On June 2, 2005, Condemnor was served with the Claimant's Note of Issue and Certificate of Readiness for Trial which represented, among other things, that " All pleadings served " and " Appraisal reports exchanged ".

The Condemnor's Position

It is the Condemnor's position that, pursuant to 22 N.Y.C.R.R. § 202.61(a)(1), " the exchange of appraisals is a prerequisite to filing and serving a note of issue and certificate of readiness "¹.

Timing of the Note of Issue

22 N.Y.C.R.R. § 202.61(a)(1) states, " In all proceedings for the determination of the value of property taken pursuant to eminent domain, the exchange of appraisal reports shall be accomplished in the same manner as provided for the exchange of such reports by subdivision (g) of section 202.59 and subdivision (g) of section 202.60 of this part, except that such reports shall be filed no later than nine months after service of the claim, demand or notice of appearance required by section 503 of the Eminent Domain Procedure Law, unless otherwise extended by the court. A note of issue may not be filed until such reports have been filed." Hence, a note of issue may not be filed until the appraisal reports referred to in 22 N.Y.C.R.R. § 202.61(a)(1) have been exchanged.

Trial Appraisals Must Be Exchanged First

In the instant matter, Claimant filed and served the Note of Issue and Certificate of Readiness on the Condemnor before the appraisal reports were exchanged. The Condemnor states that " RCSD's trial appraisal has not been exchanged, nor is RCSD obligated to do so for a period of nine (9) months from the date of service of a claim for damages pursuant to 22 NYCRR §202.61.

In fact, Claimant apparently only recently served its Claim for Damages on RCSD on June 2, 2005....Based upon this, RCSD has until March 2, 2006 in which to file and exchange its trial appraisal with Claimant pursuant to 22 NYCRR §202.61, if the matter is not otherwise disposed of earlier through negotiated settlement. "2

Pre-Vesting Offer Appraisals Are Not Trial Appraisals

The Condemnor claims that the Note of Issue, which states that the appraisal reports have been exchanged in this action, is " patently false "3, as well as the statement that Claimant is in possession of RCSD's appraisal. According to the Condemnor, " Claimant undoubtedly received a copy of RCSD's pre-vesting offer appraisal as part of RCSD's earlier good faith settlement efforts. The parties have yet to exchange trial-ready appraisals in accordance with the EDPL Article 5 and 22 NYCRR §202.61, and the Note of Issue contains material false statements reflecting that the appraisal exchange process is complete "4.

Hence, it is the Condemnor's position that the Claimant's Note of Issue and Certificate of Readiness is improper and should therefore be vacated.

The Claimant's Position

Streams Of Income & Insults

The Claimant contends that by condemning the property, the County took away the stream of income (consisting of a single-family house and a contiguous three-family house) which Claimant used to support herself, as well as commissioned an " insultingly low appraisal of the two houses for a total of \$320,000.00. The Claimant herself had the properties appraised for a total of \$526,000.00 " ⁵.

A Travesty Of Justice

The Claimant opines that there is no reason for this Court to strike the Note of Issue since it could " simply direct the completion of any additional discovery that the Court deems appropriate ", complaining that " To strike the Note of Issue and further delay these proceedings would be a travesty of justice..." ⁶. Claimant also complains that " Instead of settling with this elderly widow, the County instead paid the \$320,000.00 *into Court*, and now the County has the audacity to suggest to the Court that further delay would be appropriate." ⁷

Claimant Refused to Cooperate

The Condemnor contends that it has offered just compensation to replace the loss of Claimant's " stream of income ". These funds were deposited into a " court and trust account " only because Claimant refused to " cooperate with RCSC's title clearance requirements...RCSD made efforts to help facilitate the discharge of the liens and payment of the balance of RCSD's offer of just compensation...However, Claimant refused to execute RCSD's form of Affidavit of Title relative to the property which is acknowledged in Mr. Bertolino's letter to me dated March 25, 2005." ⁸.

Liens, Liens & More Liens

According to the Condemnor, the liens on the subject property include a mortgage to Select Portfolio Servicing with an approximate outstanding balance of \$168,098.00; unpaid real property taxes to Rockland County, the Town of Ramapo, and the Village of Hillburn in the, approximate, amount of \$10,238.00; and an unpaid water bill for usage prior to the vesting date in the amount of \$1,422.00. The Condemnor also contends that " upon information and belief, Claimant continued to collect rents from the tenants at the property for the months of February 2005 and

March 2005 ". It is the position of RCSD that it " is entitled to these amounts as the fee owner, and RCSD retains a lien for such amounts to the extent Claimant has been paid."⁹

Settlement Efforts Unavailing

The Condemnor also insists that it has made numerous efforts to compromise and settle with Claimant regarding the issue of compensation, and that " Claimant refused to compromise and has not demonstrated any apparent willingness to settle at anything but the amount stated in the Claim dated May 25, 2005 "¹⁰

DISCUSSION

The Claimant never discusses the requirement in 22 N.Y.C.R.R. § 202.61(a)(1) that trial appraisals must be exchanged as a pre-requisite to the filing of a Note of Issue and Certificate of Readiness.

Pre-Vesting Offer Appraisals Are Not Trial Appraisals

The New York Rules of Court are quite clear as to the procedure that must be followed when appraisals are exchanged, and the Claimant surely must have been aware that when stating

that " We are in possession of the County's appraisal and the County is in possession of the Claimant's appraisal "¹¹, the appraisal it referred to was the pre-vesting offer appraisal and not the trial appraisal referred to in 22 N.Y.C.R.R. § 202.61(a)(1).

In particular, that section states that the appraisal reports in eminent domain proceedings shall be exchanged in the same manner as provided for in 22 N.Y.C.R.R. § 202.59(g), which section deals with the exchange of trial appraisals in tax certiorari matters. The appraisal exchange rules stated in 22 N.Y.C.R.R. § 202.59(g)(1)(i) which also apply to the exchange of appraisals in eminent domain proceedings pursuant to 22 N.Y.C.R.R. § 202.61(a)(1), refer to the " appraisal reports intended to be used at trial ", or trial appraisals, which the pre-vesting appraisals certainly are not.

The New York State Rules of Court are clear that in an eminent domain proceeding, the exchange of trial appraisals is a prerequisite to the filing and serving of a Note of Issue and Certificate of Readiness [22 N.Y.C.R.R. § 202.61(a)(1) (" A note of issue may not be filed until such reports have been filed ")]. Accordingly, Claimant's Note of Issue and Certificate of Readiness is improper and is hereby vacated.

This constitutes the decision and order of this Court.

Dated: White Plains, N.Y.
September 12, 2005

HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. Affirmation of Jonathan Penna dated June 24, 2005 [" Penna Aff. "] in Support of Condemnor's Motion to Vacate Note of Issue, para. 6.

2. Penna Aff. at para. 6.

3. Penna Aff. at para. 6.

4. Reply Affirmation of Jonathan Penna dated July 12, 2005 [" Penna Reply Aff. "] at para. 6.

5. Affirmation of Daniel E. Bertolino dated July 8, 2005 [" Bertolino Aff. "] at paras. 3 & 4.

6. Bertolino Aff. at para. 7.

7. Bertolino Aff. at para. 5.

8. Penna Reply Aff. at para. 3, Ex. A (In this March 25, 2005 letter of Daniel E. Bertolino to Jonathan S. Penna, Mr. Bertolino stated, " I told you that I would share with you by the close of business today, the collective comments of my client and myself on the Affidavit of Title and Release. After having met with my client just now, she has asked me to advise you that she has no interest in signing any Affidavit of Title or Release instrument. Please be guided accordingly ").

9. Penna Reply Aff. at para. 4.

10. Penna Reply Aff. at para. 5.

11. Bertolino Aff. at para. 6.