Mobil Oil Corporation v City of New York

2002 NY Slip Op 30045(U)

Supreme Court, Kings County

Docket Number: 3003002/1997

Judge: Abraham G. Gerges

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At an IAS Term, Part **74** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of October, 2002

P R E S E N T:

HON. ABRAHAM G. GERGES,
Justice.

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In the Matter of the Application of the CITY OF NEW YORK, relative to acquiring title in fee simple absolute to certain real property where not heretofore acquired for the same purpose, required as the site for the

NEWTOWN CREEK WATER POLLUTION CONTROL PLANT UPGRADE (SECOND TAKING)

Index No. 30021/97

located within the area being generally bounded by Kingsland Avenue, Greenpoint Avenue, Provost Street, Paidge Avenue, and Whale Creek Canal, in the Borough of Brooklyn, City and State of New York.

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MOBIL OIL CORPORATION,

Claimant,

- against -

CITY OF NEW YORK,

Condemnor.

. . . . -X

The followina papers numbered 1 to **4** read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, claimant Mobil Oil Corporation ("Mobil") moves for an order excluding evidence at the trial of this action of any diminution in value of the property at issue by reason of claimed cleanup and removal costs of a petroleum spill. Condemnor the City of New York (the "City") cross-moves for an order directing Mobil to comply with its request for discovery relating to an offer purportedly made by Home Depot to purchase property from Mobil in the vicinity of the subject property.

Facts and Procedural Backaround

Mobil was the owner of a bulk oil storage facility located at 300 North Henry Street in Brooklyn (the "property"), which was acquired by the City on September 19, 1997 in this eminent domain proceeding for use as part of the Newtown Creek Water Pollution Control Plant. The property was acquired to satisfy the requirements of a settlement of a previous action commenced against the City by the State of New York, which directed the acquisition of land for the upgrade of the pollution control facility. The property is comprised of approximately six acres and is located in the Greenpoint section of Brooklyn, bounded by Kingsland Avenue to the north and east, by Greenpoint Avenue to the south and north, and by Henry Street to the west.

Prior to the acquisition, some time between January 29 and February **6,** 1990, approximately 50,000 gallons of petroleum were spilled from one of the storage tanks on the subject property. On April **13,** 1990, Mobil entered into an Order on Consent with the New York City Department of Environmental Protection, which referred to and incorporated by

reference certain terms of an Order on Consent entered into on February 27, 1990 between Mobil and the New York State Department of Environmental Conservation (the "Consent Orders").[1] Both Consent Orders required Mobil to establish and comply with an approved remediation program and to monitor and continuously remove free product from the property. Mobil contends that from that time, it has acted in accordance with the approved remediation program, it has been in compliance with the Consent Orders, and substantially all of the free product on the property had been recovered before the date that the City acquired title to the property.

In preparation for trial, the City and Mobil exchanged appraisals of the value of the property. The Mobil appraiser valued the property at $10,300,000 as of the date of the taking, based upon a highest and best use for "big box" commercial development, which would require no additional remediation for residual contamination. The City appraiser, in a first appraisal, valued the property at $2,600,000 as of the date of the taking, based upon a highest and best use for industrial development. The appraiser then opined that after a set-off for demolition and estimated future cleanup costs, which the **City** alleged exceeded that amount, the property would have a nominal value of $1,000. The same appraiser exchanged a second "hypothetical" appraisal, which valued the property at $6,270,000 before any demolition and cleanup costs are deducted. In its appraisal reports, the City set forth several

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[1] In the Consent Orders, Mobil "neither admits nor denies the allegations made against it" with regard to the oil spill. Nonetheless, Mobil accepted responsibility for the cleanup costs and paid fines totaling $510,000.

scenarios for different levels of cleanup and opted for a scenario consistent with using the property for industrial development.

On September 19, 2000, the City commenced an action against Mobil under Article 12 of the New York State Navigation Law (Kings County Sup. Ct., Index No. 32613/00) (the "Navigation Law Action"). Therein, the City seeks to recover "costs and damages, both direct and indirect, for the remediation, cleanup and removal of petroleum," both as incurred and as will be incurred by the City.[2]

The In Limine Motion

In support of its motion to exclude evidence of any diminution of value in the property resulting from the contamination and remediation costs, Mobil argues that since the City is not using the property for industrial purposes, but is instead using it to upgrade its water pollution control plant, it will be impossible to accurately segregate the cleanup cost for this use from the cost that would be necessary to clean up the property for industrial development. Further, Mobil contends that the City is seeking to obtain a windfall profit by claiming an offset in this proceeding if the projected cleanup costs for use as a water pollution control plant exceed the cost of cleanup for industrial use.

More significantly, Mobil argues that in view of the concurrent pendency of the Navigation Law Action, the City is seeking a duplicate consideration of its claimed damages. Specifically, in this proceeding, the City is seeking a set-off from the fair market value

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[2] The complaint does not state the amount of damages that the City is seeking to recover.

attributable to the projected cleanup costs incurred for the removal of contaminants, while in the Navigation Law Action, it is seeking to recover both direct and indirect damages, which Mobil speculates will include the actual cleanup costs and any diminution in value of the property due tu any stigma claimed to have attached by virtue of the contamination. Mobil concludes that since the City chose to seek to recover direct and indirect damages in the Navigation Law Action, it should be preluded form seeking a set-off in this proceeding for the same damages. Further, litigation of the damage claims in the Navigation Law Action is also appropriate so that Mobil can implead any third-parties that may be responsible for the spill, should any be discovered, and would preclude the City from impermissibly splitting its claim; for damages. Finally, such a ruling would streamline this valuation trial by substantially reducing the proof necessary to establish the fair market value.

The City opposes this motion, arguing that there is nothing in the Navigation Law that precludes the court from taking into account environmental cleanup costs in valuing the property, which is environmentally contaminated. Hence, it is proper to measure the cleanup costs necessary to bring the property to its highest and best use herein. Moreover, if Mobil is successful on this motion, it would gain a windfall by having the court ignore the contamination as it reduces the market value of the property in this proceeding, and still maintain all defenses that it may have to liability under the Navigation Law.[3] In addition, the damages sought in the Navigation Law action are far greater than the diminution of value

[3] The City does not identify the defenses that Mobil has asserted and/or that it believes Mobil will assert in seeking to avoid liability in the Navigation Law Action.

argued herein, since the cost of the remediation and excavation necessary to use the property as a water pollution control plant exceeds the costs that could be incurred for use of the property in industrial development, which use is at issue in this proceeding.

Discussion

As a threshold issue, the court notes that the City's reliance upon the case of *Commerce Holding Corp. v Board of Assessors of the Town of Babylon* (88 NY2d 724) is misplaced. In that case, the issue addressed was whether environmental contamination should be considered in valuing property for tax purposes. Therein, the court held that since environmzntal contamination can depress a parcel's true value, consideration of the environmental contamination is necessary, recognizing that:

> "The cardinal principle of property valuation for tax purposes, set forth in the State Constitution, is that property "[a]ssessments shall in no case exceed full value" (NY Const, art XVI, § 2; *see, Grant* Co. *v Srogi,* 52 NY2d 496, 512). As this Court has stated, the "ultimatepurpose of valuation . . . is to arrive at a fair and realistic value of the property involved" (*Matter of Great Atl. & Pac. Tea* Co. *v Kiernan,* 42 NY2d 236, 242)."

(*id.* at 729). The *Commerce Holding Corp.* case is readily distinguishable from the instant case, sincc in a tax certiorari proceeding, the property owner who is paying the remediation costs is the party seeking the tax reduction based upon the cost of cleaning up the contamination; there is no transfer of title involved; there are no due process issues raised by the tax challenge; and there is no issue regarding double recovery to be addressed.

The issue presented herein, whether evidence of a claimed diminution of value resulting from environmental contamination is admissible in a condemnation proceeding, has not yet been resolved in New York State, although the issue has been addressed in other jurisdictions *(see,* Goldstein and Rikon, NYLJ, December 26, 2001, p 3, col 1, Condemnation and Tax Certiorari).[4] In cases that have addressed the issue, the starting point has been the recognition that the fifth amendment to the United States constitution, as applied to the states through the due process clause of the fourteenth amendment, requires that private property shall not be taken for public use, without just compensation *(see, e.g. Northeast Ct. Economic Alliance v ATC Partnership,* 256 Conn 813, 828 [Conn 2001]; *Aladdin v Blackhawk County,* 562 NW 2d 608, 611 [Iowa 1997]; *State* v *Brandon* (898 SW 2d 224 [Tenn 1995]). The cases also accepted the basic proposition that ordinarily, the fair market value of the property when put to its highest and best use at the time of the taking is the proper measure of just compensation *(see id.).* A review of the cases, however, reveals a split in authority. What follows is a discussion of some of those decisions.

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[4] The issue arose in the Court of Claims in the recently decided case of *Northville Industries Corporation v State* (Ct Cl, Claim No. **97489** [Jan 2002]). That case provides no guidance here, however, since:

> Prior to the commencement of the trial, the parties agreed to withdraw from the Court's consideration the issue of whether the Court of Claims could address the cost of an environmental clean-up at the site. The parties agreed between themselves that the Court of Claims did not have jurisdiction and presented no evidence regarding remediation.

(*id.* at n 1).

[* 8]

Cases Holding that Admission is Proper

In the recent case of ***Northeast Ct. Economic Alliance, Inc. v ATC Partnership*** (256 Conn 8 13 [2002]), the Supreme Court of Connecticut reversed the finding of the lower court and held that evidence of environmental contamination and remediation costs is relevant to the valuation of real property taken by eminent domain and is admissible in a condemnation proceeding to show the effect, if any, that those factors had on the fair market value of the property on the date of the taking. The court reasoned that excluding contamination evidence, as a matter of law, is likely to result in a fictional property value — a result that is inconsistent with the principles by which just compensation is calculated. The court based its holding upon the "the general conclusion that, as a factor affecting the fair market value of the property, evidence of environmental contamination and remediation costs is admissible" (***id.*** at 830 -831, ***citing Redevelopment Agency v Thrifty Oil*** Co., 4 Cal App 4th 469,474 n. 9 [Cal 1995]; ***Olathe v Stott***, 253 Kan 687,689-90 [Kan 19931; ***Brandon*, 898 SW** 2d 224,225 [Tenn 19951). The court also set forth a formula pursuant to which fair market value is to be arrived at: "(1) evidence of sales of uncontaminated comparable property, **(2)** discounted by some factor, not necessarily dollar-for-dollar, but not necessarily precluding dollar-for-dollar, in the fact-finding discretion of the court, including the costs of the remediation" (***id.*** at 842-843).

The Connecticut court also addressed arguments raised by the condemnec and discussed several cases decided in otherjurisdictions that held that evidence of contamination

and remediation is not admissible, explaining why it disagreed ***(see, e.g. Aladdin,*** 562 NW 2d 608 [Iowa 19971; ***Department of Transportation v Parr*** (259 Ill App 3d 602, ***appeal denied*** 157 Ill 2d 497 [Ill 19941). The court explained that those cases finding that evidence of contamination was inadmissible improperly emphasized fault, which is not at issue in a condemnation proceeding; refused to consider that the cost of remediation had an effect on value; and/or involved fact patterns where the presence of contamination was unclear. In addressing the issue of a windfall to the condemnor, the court noted that the remediation costs incurred subsequent to the taking in the case before it had been covered largely by federal and state funds, no remediation action had been brought against the condemnee, and there was no evidence in the record to suggest a realistic likelihood of any future remediation action being commenced ***(id.*** at 842).[5] Thus, there was no credible claim of double liability ***(id.*** at 842-843). The court also noted that to the extent, if any, that the condemnee believed that the condemnor would receive a windfall by the admissibility of environmental remediation costs, such claim could be raised at during trial ***(id.*** at 843 n 18).

In the case of *Finkelstein v Department of Transportation* (656 So 2d 921 [Fla 1995]), the Supreme Court of Florida held that although evidence and testimony as to environmental remediation costs were not relevant in that action, since the cost of remediation of contamination was being reimbursed through an early detection incentive program, evidence

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[5] In fact, the court noted that the condemnor had already sold the property to a private corporation for development, without commencing an action seeking to recover remediation costs.

of enviroiimental contamination is relevant and admissible on the issue of market value in an eminent domain valuation trial if there is a sufficient factual predicate upon which to conclude that contamination affects the market value of the property taken. This holding was premised upon the court's recognition that evidence of the fact that property is or had been contaminated is relevant to the market value of property in an eminent domain valuation proceeding, since discovery of contamination can "stigmatize" property, and hence reduce its value (***id.*** at 924). The court went on to hold that any comparable sales which were used as a basis for an opinion that contamination had resulted in a decrease in value must be of comparable contaminated property which had been successfully cleaned (***id.*** at 925).

In the case of ***State v Brandon*** (**898 SW** 2d 224 [Tenn 1995]), the Tennessee Court of Appeals held that the trial court improperly prohibited introduction of evidence of environmzntal contamination on the property in question, as well as the cost of reasonable steps taken to remedy contamination, since such evidence was relevant on the issue of valuation. In its decision, the court noted that in support of its position, the State relied upon an affidavit from **a** banker, who opined that he "***never closed a loan on a property knowing there is an existing environmental contaminationproblem***" (***id.*** at 226), and the affidavit of an appraiser, who alleged that in determining the fair market value of property when an environmental problem exists, he would appraise "the property as though it is clean, and then offset from that amount any attendant costs for the investigation and remediation of said environmental problems. Also to be considered is the stigma attached to such

properties . . . [which] often results in a detrimental effect upon the fair market value" ***(id.*** at 226-227).

In ihe case of ***City of Olathe v Stott*** (253 Kan 687 [Kan 1993]), the Supreme Court of Kansas held that evidence of environmental contamination is admissible in eminent domain proceedings involving the determination of fair market value of property taken. In so holding, tlie court rejected the property owner's argument that such evidence should not have been admitted on the ground that a more specific act, the Kansas Storage Tank Act (K.S.A. 65-34,100 et seq.), preempted the more general condemnation statutes (K.S.A. 26-501 et seq.), and provided the only relief available in Kansas for contamination damage restilting from leakage of underground storage tanks ***(id.*** at 689). The court thus concluded that since evidence of underground petroleum contamination necessarily affects the market value of real property, evidence of such contamination is admissible in an eminent domain action (*id.*).[6]

In the case of the ***Redevelopment Agency of the City of Pomona v Thrifty Oil Company*** (4 Cal App 4th 469 [Cal 1995]), the California Court of Appeals held that the remediation issue was properly before the jury in determining the fair market value of the property, since it was a characteristic of the property which would affect its value and it was used by all experts in determining the fair market value of the property ***(id.*** at 474 n 9). No further rationale for this holding was discussed in the decision.

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[6] This case, which was decided on a narrow procedural interpretation of Kansas' statutes, and which did not discuss any policy considerations. is of little precedential value.

Cases Holding that Admission is Improper

In the case of ***Silver Creek Drain District v Extrusions Division, Inc.*** (245 Mich App 556, ***lv granted*** 644 NW 2d 761 [Mich 2001]), the Michigan Court of Appeals held that the Uniform Condemnation Procedures Act (UCPA) did not vest courts with authority to account for estimated remediation costs of contaminated property when calculating the amount of just Compensation due to a property owner. This holding was premised upon an analysis of the UCPA, which was amended in 1993 to incorporate procedures addressing the potential of liability arising from cleanup costs of property subject to acquisition through the exercise of eminent domain (***id.*** at 564). Since 1993, the UCPA "requires the condemning agency to either waive or reserve its 'rights to bring federal or state cost recovery actions"' (***id.*** at 565, ***citing*** MCL 213.58 [1]) and "vests the court with the authority to protect the condemning agency should it prevail in a cost recovery action by allowing 'any portion of the money deposited . . . to remain in escrow as security . . . ."' (***id.***). Hence, the court concluded that the language of the UCPA supported "the conclusion that any form of cost recovery arising from environmental contamination is to he pursued in a separate cause of action" (*id.*).[7]

The Michigan court further noted that "[p]recluding the consideration of remediation costs when determining just compensation is also consistent with the traditional notion that the landowner should be placed in as good a condition as it would have been had the taking not occurred" (***id.*** at ***567, citing Wayne Co. v Britton Trust,*** 454 Mich ***608***). The court

[7] Like the *Olathe* case (253 Kan 687), this case is of little precedential value to the extent that it is premised upon the interpretation of specific provisions of the UCPA and MCL.

continued, recognizing that "[w]hile the fear of liability arising from environmental contamination may render a property nontransferable, it does not render it valueless, and it is virtually impossible to find a comparable parcel of property on which to base an estimation of value" (*id.* at **567).**

In the case of ***Aladdin, Inc.*** v ***Blackhawk County*** **(562** NW 2d **608[1997]),** the Supreme Court of Iowa held that a condemnation award that deducted the estimated cost of cleanup from the value of the condemned land deprived the owner of just compensation. Therein, the court recognized that before a landowner can be held responsible for cleanup costs in Iowa, an action must be brought by the Department of Natural Resources ***(id.*** at **615, *citing*** Iowa Code §§ **455B.381-.399),** or by a citizen ***(id., citing*** § **455B.381.111),** in a procedure that affords a property owner significant procedural safeguards that are not available in a condemnation proceeding. The court concluded that:

> "[i]f this procedure was not followed and the value of the property condemned is reduced by the estimated cost of cleanup, the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will still have the same legal liability for cleanup cost as before."

(id. at **615).** Further, if it is proven that an owner is legally responsible for the complained of contamination and cleanup costs incurred, such costs can be recovered from the owner after the commendation proceeding ***(id.).*** The court also noted that traditional expert testimony as to fair market value based on comparable sales would be unavailable in most instances because of the difficulty in locating comparable contaminated property sales, which

would result in the judge or jury being required determine just compensation by speculating as to the damages (*id.* at 616).

In the case of the ***Department of Transportation v Parr*** (**259** Ill App 3d 602, *appeal denied* 157 Ill 2d **497** [Ill **1994]),** the Illinois Appellate Court held that environmental remediation costs are not admissible in eminent domain actions to determine fair market value of condemned property because (1) environmental remediation costs have no direct bearing on the valuation of condemned property; and **(2)** the admission of environmental remediation costs into evidence would violate the due process rights of property owners under the Illinois Environmental Protection Act (*id.* at 602-603). In so holding, the court emphasized that remediation costs, standing alone, did not constitute a condition on the property affecting its value; "rather, as distinguished from a condition, environmental remediation costs constitute merely the price of removing from the property a condition which may or may not exist" (***id.*** at 605). The court accordingly found "a crucial distinction between the existence of conditions on the property and the costs to provide a remedy for such alleged conditions on the property" (***id.*).**

The Illinois court also noted that under the procedure followed therein, the condemnor informed the property owners that their property was being taken and that they owed over $100,000 for the cost of remediation. Hence, "the costs' admission in a condemnation proceeding without the procedural safeguards provided in the Environmental Protection Act would permit [the condmenor] to circumvent the procedures established by the legislature

and the Environmental Protection Agency for recovering environmental remediation costs" (*id.* at **606**). More specifically, the procedure utilized failed to provide the property owners with any notice of their impending liability or the reasons therefor and denied them of their right to require proof of the existence of a violation and/or to bring third-party actions against prior owners of the property.

Application of the Law to the Facts

Applying the reasoning discussed in the above cases, it is concluded that on the facts of this case, evidence of any diminution in the value of property due to claimed contamination and the costs of remediation is not admissible in this condemnation proceeding. In so holding, the court is persuaded that the concurrent pendency of the Navigation Law Action, in which the City seeks the recovery of both direct and indirect damages, compels this conclusion.

Pursuant to Navigation Law § **181** (1), "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section." In view of the Consent Orders entered into by Mobil, along with the remediation and monitoring efforts undertaken, Mobil will not be able to successfully argue that no contamination existed on the property or that it is not responsible for the costs of the cleanup.[8] From this, it follows that

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[8] In this regard, it is noted that in the Consent Order entered into with the New York State Department of Environmental Conservation, Mobil "reported an 80-gallon spill to the Department at approximately 12:48 p.m., February 5, 1990"(Consent Order, para **8).**

the City will almost certainly succeed in establishing liability for damages in the Navigation Law Action.[9] Thus, Mobil's concern that the City will reap a windfall profit if it is permitted to reduce the value placed on the property in this condemnation, while at the same time demanding that Mobil bear all remediation costs in the Navigation Law action, is well founded.

Hence, this case is procedurally similar to ***Aladdin*** (*562* NW 2d 608), in which the court held that if "the value of the property condemned is reduced by the estimated cost of cleanup, the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will still have the same legal liability for cleanup cost as before" (***id.*** at 615). Given the similarities between the issues raised in this case and in ***Aladdin, Aladdin*** provides persuasive authority.

In this regard, it is also recognized that this case is readily distinguishable from ***Northeast Ct. Economic Alliance*** (*256* Conn **813**). Therein, the court discussed at length the importance of the fact that no remediation action had been commenced against the condemnee, there was no evidence in the record to suggest a realistic likelihood of any future remediation action being commenced, and the remediation costs incurred subsequent to the taking had been covered largely by federal and state funds (***id.*** at **842**). In this case, a remediation action is currently pending and there is no indication that any remediation costs

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[9] Indeed, given the statute's imposition of strict liability, a finding in the Navigation Law Action that Mobil is not liable for any further remediation costs would have to be predicated upon a finding that no damages could be proven.

have been reimbursed. Further, in ***Northeast Ct. Economic Alliance,*** the court acknowledged that it would deviate from the general rule governing the measure of fair market value in eminent domain proceedings "in a situation where its application produced an unfair result" (***id.*** at **842 - 843** [citations omitted]). Under the circumstances presented in the instant proceeding, allowing the City to reduce the value of the property in the condemnation proceeding, while at the same time requiring Mobil to pay both direct and indirect damages in the Navigation Law Action, is likely to produce "an unfair result."

Further, the City alleges that in the Navigation Law Action, it intends to seek to recover the remediation costs necessary to use the property as a water pollution control facility, since that law permits the recovery of both direct and indirect damages." The cost of such remediation is not recoverable in this condemnation proceeding, since neither party argues that the highest and best use for the property is as a water pollution control facility. Thus, the City cannot recover the full amount of damages demanded in this proceeding. Permitting it to recover a portion of its damages herein, while seeking to recover another portion in the Navigation Law Action, will prove to be unnecessarily burdensome, since expert testimony on remediation will be required in both actions, although the damages for which compensation is available will be broader in the Navigation Law Action. Allowing the introduction of evidence of contamination herein would accordingly result in two trials at which duplicative evidence would be offered. Such a result would unnecessarily increase

[10] In addressing this issue, the court expresses no opinion with regard to what damages, if any, the City will be entitled to recoup in the Navigation Law Action.

the time and cost of this condemnation proceeding for both the parties and the court," and would increase the possibility of a double recovery for the City. To the extent that the Navigation Law Action seeks to avoid awarding duplicative damages to the City, the issues presented therein will be further complicated by the need to introduce evidence to establish which elements of damage, if any, the City already received compensation for by reducing the fair market value paid for the property in the condemnation proceeding.

Further, pursuant to Navigation Law § **176 (8):**

> "Notwithstanding any other provision of law to the contrary, including but not limited to section **15-108** of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party."

*(see **Volunteers of America v Heinrich,*** **90 F** Supp 2d 252 [plaintiff has the right to seek contribution from any other responsible party for costs incurred in providing cleanup or removal of discharge of petroleum pursuant to the plain language Navigation Law § **1761).** In addition, Navigation Law § **18** 1(**5**) provides that:

> "Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this

[11] Such a result would be particularly burdensome for Mobil, who must bear the cost of retaining experts to testify in both the condemnation proceeding and in the Navigation Law Action; in contrast, the cost to the City will be paid for by public funds *(see **Aladdin,*** **562** NW2d at 616).

> section shall be limited to the damages authorized by this section."

It has been held that this provision provides sufficient authority for a party to seek reimbursement against the person who discharged the pollutant, if a third-party is liable (***White*** v ***Long,*** 85 NY2d 564). A claim against a third-party may also be asserted pursuant to Navigation Law § 193, which provides that:

> "Nothing in this article shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this article **are** in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup and removal costs pursuant to any other state or federal law shall be permitted to receive compensation for the same damages or cleanup and removal costs under this article."

(***see Calabro v Sun Oil Co.,*** 276 AD2d 694 [cause of action in negligence to recover for costs incurred as the result of the cleanup of an oil spill exists as a separate, substantive cause of action indzpendent of provisions of Navigation Law imposing strict liability for cleanup costs]). Mobil's right to recover against a third-party for any claimed contamination is not available in this condemnation proceeding. Thus, requiring Mobil **to** address the issue herein, where it does not have the right to commence a third-party action against any party believed to be responsible for the petroleum spill, would result in a denial of due process (***see Aladdin,*** 562 NW 2d 608; ***Department of Transportation,*** 259 Ill App 3d 602).

Accordingly, for the foregoing reasons, Mobil's motion for an order excluding evidence at the trial of this action of any diminution in value of the property at issue by reason of claimed cleanup and remediation costs of a petroleum spill is granted.

Discovery Relating to the Home Depot Offer to Purchase

In support of its cross motion seeking the production of information relating to an offer to purchase property in the vicinity of the subject property from Mobil by Home Depot, the City alleges that in March 2001, a letter requesting such information was sent. To date, no such information has been provided.

Discussion

"The rules governing discovery are 'to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'" (***CMRC*** v ***State,*** 270 AD2d 27, 30, ***citing Allen*** v ***Crowell-Collier Publ. Co.,*** 21 NY2d 403,406).

> "Pretrial disclosure may be allowed in a condemnation proceeding when warranted by the circumstances of the case and in the interest of justice (*Matter of Huie (Friedman's Lake View Hotel*), 208 Misc 82; 3A Weinstein-Korn-Miller, N.Y.Civ.Prac., pars. 3101.21, 3140.01).
>
> "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 (***see Allen*** v ***Crowell-Collier Pub. Co.,*** 21 NY2d 403, 407)."

(***White Plains Urban Renewal Agency v 56 Grand St. Assocs.,*** 47 AD2d 536,536 - 537).

Further, "[o]n a motion to determine whether the material sought was prepared for litigation and is thus immune from discovery pursuant to CPLR 3101(d), the burden is on the party resisting disclosure to show immunity" (***Mobil Oil v State***, 52 AD2d 1033, 1033, ***citing Koump v Smith***, 25 NY2d 287, 294; ***Dikun v N.Y. Cent. R.R.***, 58 Misc 2d 439; ***Weisgold v Kiamesha Concord***, 51 Misc 2d **456**; ***see generally*** NY Jur 2d Disclosure § 93, Burden of Proof). Similarly, "the burden rests upon the party resisting disclosure to demonstrate that the material sought was prepared solely for litigation and not in the regular course of business" (***Weaver v Waterville Knitting Mills***, 78 AD2d 574, 575, ***citing Mobil Oil v New York, id.***).

Applying the above principles to the facts of this case, the court determines that informatinn relating to an offer to purchase property in the vicinity of **the** subject property from Mobil by Home Depot bears on the controversy and will assist preparation for trial. Further, Mobil offers no reason why an order directing such production should not be granted.

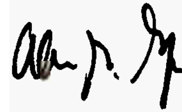
Conclusion

Mobil's motion for **an** order excluding evidence at the trial of this action of any diminution in value of the property at issue by reason of claimed cleanup and remediation costs of a petroleum spill is granted. The City's cross motion for an order directing Mobil to produce information relating to an offer to purchase property in the vicinity of the subject

property from Mobil by Home Depot is granted and Mobil is directed to provide such information within 20 days of service upon it of a copy of this order with notice of entry.

The foregoing constitutes the decision and order of the court.

E N T E R ,



J. S. C.