STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
HERRICKS FORE PLAN, INC.,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

THE STATE OF NEW YORK,

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7425 Index No. 1291-07

Appearances: Siegel Fenchel & Peddy, P.C.
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner Herricks Fore Plan, Inc. (Herricks) commenced this CPLR article 78 proceeding seeking a judgment directing the respondent the State of New York (State) to disburse payment of Herricks' $160,000 condemnation award with statutory interest pursuant to the Agreement of Adjustment dated July 12, 2006 and an award of attorneys fees pursuant to Eminent Domain Procedure Law § 701. The State opposes the petition, seeking its dismissal.

This proceeding arises from the State's partial taking of a multi-rental commercial property in the Town of North Hempstead (subject property). Herricks leased the subject property and then subleased it to various vendors. In an "Agreement of Adjustment" (the agreement) dated July 12, 2006, Herricks and the State agreed that the State would pay Herricks $160,000 for Herricks' interest in the subject property pursuant to claim number 106368, which, on July 16, 2002, Herricks filed in the Court of Claims (see Petition, Exhibit A). Claim number 110841 filed in the Court of Claims on June 15, 2005 by the fee owner – Elizabeth S. Miller and Marjorie S. Grochola, as Trustees – was consolidated with claim number 106368 (see id.). The agreement provided, among other things, that Herricks would, as a prerequisite to receiving payment, "execute and deliver or cause the execution and delivery to the Attorney General of all formal papers which the Attorney General deems necessary to authorize payment and secure to the State a full release of all claims by reason of the aforementioned appropriation. . . ." (id. at ¶ 2).

On August 9, 2006, the State forwarded to Herricks various papers to execute or have

executed to facilitate payment under the agreement. Among those papers were assignments of claims and releases to be executed by W. Dank, Inc.; Federal Capital Corp.; and Sweet Peal Fruit Exchange, Inc. (see Petition, Exhibit B). Thereafter, Herricks obtained the requested releases from all tenants who were in possession of leased spaces as of May 8, 2002 – the date title vested in the State for the subject property – with the exception of W. Dank, Inc. (Dank) and Sweet Pea Fruit Exchange, Inc. (Sweet Pea). Dank and Sweet Pea had previously moved out and assigned their subleases to other entities. Herricks obtained releases from the current tenants of those spaces –J.C.A. Association, Inc. and The Sweet Pea Fruit, Inc. – and, on October 4, 2006, informed the State of the same.

On October 5, 2006, the State requested that Herricks provide it "with additional documentation establishing the basis on which assignments of claims and releases should now be obtained from J.C.A. Association, Inc. and the Sweet Pea Fruit, Inc. in lieu of the entities which were originally requested" (von Bieberstein Letter [10-5-06], Petition, Exhibit F). The letter also noted that "if the rights of the new sub-lessees were acquired subsequent to May 8, 2002, absent a full and unambiguous assignment of any interest in the appropriation claim by the original sub-lessees to the new sub-lessees, we would still need releases(s) from the original sub-lessees" (id.).

On October 26, 2006, Herricks forwarded the State information outlining the assignments of Dank and Sweet Pea (see Petition, Exhibit G). Herricks took the position that releases from the current tenants satisfied the State's request since the assignors transferred

all interests in the subject property to the assignees.

On November 1, 2006, the State informed Herricks that the original tenants and not the assignees must sign the release documents. The State explained that Dank and Sweet Pea held the subleasehold interest on the date the acquisition map was filed – May 8, 2002– and the assignments did not specifically assign the appropriation claim (see van Bieberstein Letter [11-1-06], Petition, Exhibit H).

On November 21, 2006, Herricks responded:

> "With all due respect, I believe the position of the State is legally erroneous. These are unqualified, unconditional assignments. They assign the entire interest of the Tenant/Assignor to the new Tenant/Assignee. No interest is retained and certainly no condemnation interest. Clearly the interest in the condemnation . . . (if any) is assigned. Therefore, the current Assignee, possessing all the rights of the Assignor, can release any interest including the interest in the condemnation award" (Fenchel Letter [11-21-06], Petition, Exhibit I).

In addition, Herricks noted:

> "Almost every condemnation extends over many years – frequently five (5) years or more. Multi-tenanted properties such as shopping centers, strip centers, multi-occupied industrial and office buildings are often affected. The tenancies in these properties are in a constant state of flux w[ith] tenants moving in, moving out and assigning, subleasing or terminating their interests. Applying your requirement to the processing of a condemnation award would make processing an impossibility requiring a time consuming, expensive and needless (if not futile) search for the original tenants" (id.).

In reply, the State noted it again reviewed the matter and held to its original position (see von Bieberstein Letter [11-30-06], Petition, Exhibit J).

On February 13, 2007, Herricks commenced this proceeding, seeking, inter alia, a

judgment directing the State to disburse payment of its condemnation award pursuant to the Agreement of Adjustment. In support of its petition, Herricks submitted the documentation discussed above. Herricks argued that all rights to the subject property, including the right to the appropriation claim had been assigned by the sub-lessors to the sub-lessees. Herricks also noted that, even if the rights were not fully assigned, the time during which an appropriation claim could be made has expired. Herricks contends that the title vested in the State on May 8, 2002 and Notice of acquisition was given on May 13, 2002. Further, Herricks notes that no tenant has filed a claim relating to the appropriation. Accordingly, Herricks argues that a judgment directing disbursement is warranted.

In response, although the State agrees that title vested in it on May 8, 2002, it denies allegations that a claim, if filed by a tenant, would be time-barred (see Answer). The State further contends that this matter should be determined by the Court of Claims since the Court of Claims has a procedure for determining who among interested parties may share in the proceeds of an amount placed in deposit regarding an appropriation claim. The State notes that such a procedure "is intended to provide a remedy as in the instant matter where a conflict has arisen such that the Attorney General is unable to authorize payment pursuant to 'an agreement adjusting all legal damages caused by such acquisition'" (Answer at ¶ 10, quoting EDPL 304 [E] [1]). The State contends that, since the original tenants continued to enjoy rights in the leased premises after the assignment, those tenants are condemnees as defined by EDPL 103 (E) and, thus, a release is needed from those tenants to "secure to the

State a full release of all claims caused by the appropriation" (id. at ¶ 12). Further, the State argues that, since Herricks has not demonstrated a clear legal right to the relief requested, Herricks is not entitled to relief in the form of mandamus.

In reply, Herricks contends that this is not a dispute involving conflicting claims; thus, an article 78 proceeding is appropriate. Herricks again argues that the subject assignments are unlimited. Otherwise, Herricks reiterates, inter alia, that the time in which a claim could be brought has expired.[1]

Without prior consent of the Court, the State submitted a further affirmation. The State contends that the submission was necessary as Herricks "grossly misrepresented" the State's position in its reply (Shehigian Affirmation at ¶ 2). While the Court does not agree with that assessment, it will consider the affirmation, especially since there is no objection from Herricks (see CPLR 7804 [d]; 2214). That affirmation, for the most part, reiterates the State's prior points. The State notes, however, that it has, in essence, made payment to Herricks since it has placed the full amount due under the Agreement of Adjustment, plus interest, on deposit in an interest-bearing account (Shehigian Affirmation at ¶ 5).

EDPL 503 (A) provides, in relevant part:

> "In a claim for damages arising from the acquisition of real property . . . a condemnee shall file within three years after service of the notice of acquisition or date of vesting . . . a claim for damages with the clerk having

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[1] Although not parties to this proceeding, the fee owner submits an affirmation and reply affirmation adopting and supporting Herricks' position in this proceeding (see Gutleber Affirmation in Support; Gutleber Affirmation in Further Support).

> jurisdiction of the matter. . . . The failure of a condemnee to file a claim within such three year period shall be deemed an acceptance of the amount paid as full settlement of such claim."

Further, the EDPL provides that title vests in the State upon the State filing an acquisition map in the office of the county clerk or register (see EDPL 402 [A] [3], [4]; 51 NY Jur 2d, Eminent Domain §370]). Moreover,

> "Where the condemnor is the state in an acquisition under the jurisdiction of the court of claims, . . . the condemnor, within 90 days after filing the acquisition map, must serve . . . upon each condemnee a notice of acquisition and a copy of that portion of the acquisition map affecting the condemnee's property. . . ." (51 NY Jur 2d, Eminent Domain § 398; see EDPL 502 [A] [1]).

Here, this Court agrees that, notwithstanding the status of the assignments from Dank and Sweet Pea to the current tenants in the subject property, Dank and Sweet Pea would be foreclosed from filing a notice of claim regarding the subject property. First, the record establishes that the vesting date was May 8, 2002. Although the parties dispute when a notice of acquisition was served, under the EDPL it is required to be served 90 days following the vesting date. Thus, such notice would need to have been served in mid-August 2002 – more than five years ago and four years from when the State first requested releases from Dank and Sweet Pea. Thus, any claim relating to the appropriation of the subject property served now would be untimely since such a claim needed to be filed three years after service of notice of acquisition and would have been untimely at the time the State requested Herricks provide releases from Dank and Sweet Pea (see EDPL 503 [A]; Corn Hill Landing, LLC v State of New York, 12 Misc 3d 874, 878 [Ct Cl, 2006], citing EDPL 503

[A]; see also Court of Claims Act § 10 [1]). Moreover, the Second Department has held that, once payment is made, a party is foreclosed from attempting to seek to file a late notice of claim (see Biz-Biz Corp. v State of New York, 29 AD3d 720, 720-721 [2d Dept 2006]; Boyajian v State of New York, 293 AD2d 560, 561 [2d Dept 2002]).

Further, a writ of mandamus is appropriate under the circumstances presented here since Herricks has a clear legal right to the payment under the agreement (see Matter of Mordecai v State of New York, 140 AD2d 782, 784-785 [3d Dept 1988]; see also Matter of Northville Indus. Corp. v State of New York, 14 AD3d 817, 818 [3d Dept 2005]). As discussed above, since any appropriation claim by Dank and Sweet Pea would have been untimely at the time the State sought Herricks to provide releases from Dank and Sweet Pea, such releases were not reasonably necessary to authorize payment from the State. Accordingly, this Court grants the petition to the extent that it directs that the State disburse the funds in accordance with the agreement, plus the appropriate statutory interest, which the State acknowledges it has deposited in an interest-bearing account. This Court, however, denies the relief requested to the extent that Herricks seeks counsel fees (see EDPL 701).

Otherwise, the parties' remaining arguments either lack merit or need not be reached in light of this Court's determination.

Accordingly, it is

ORDERED and ADJUDGED, that the relief requested in the petition is granted to the extent that the respondent State of New York is directed to disburse funds relating to

claim number 106368 pursuant to the parties July 12, 2006 Agreement of Adjustment, along with statutory interest.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the petitioner Herricks Fore Plan, Inc. who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: September 17, 2007
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated February 9, 2007;
2. Petition verified February 9, 2007, with accompanying Exhibits A-J;
3. Answer verified March 9, 2007, with accompanying Exhibit 1;
4. Affirmation in Support of Edward J. Gutleber, Esq., affirmed March 9, 2007;
5. Reply verified April 20, 2007, with accompanying Exhibits R-1 – R-4;
6. Affirmation of Donald E. Shehigian, Esq., affirmed April 27, 2007;
7. Affirmation in Further Support of Edward J. Gutleber, Esq., affirmed May 2, 2007, with accompanying Exhibit A.