SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JAMES J. ROYAL and LINDA J. ROYAL — PART C-2

Plaintiffs, — Present:
HON. THOMAS P. ALIOTTA

-against-

DECISION & ORDER

THE CITY OF NEW YORK — Index No. 100886/07
Motion No. 2128 - 001

Defendant.

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The following papers numbered 1 and 2 were used on this motion this 5th day of December, 2007:

	Papers Numbered
Plaintiff's Notice of Motion for Summary Judgment and Supporting Papers	**1**
Defendant's Memorandum of Law in Opposition to Motion	**2**

Upon the foregoing papers, plaintiffs' motion for summary judgment is denied.

In this declaratory judgment action, plaintiffs allege that the real property that they own at 3290 Amboy Road in Richmond County and upon which their residence is located is encumbered by a proposed widened street line for Amboy Road that bisects the parcel. Accordingly, they seek a judgment declaring that the related official map (No. 1011) of the City of New York, as adopted by the Board of Estimate on December 20, 1918, is void and of no effect as an unlawful taking of their property without due process.

It is undisputed that plaintiffs sought identical relief in a prior declaratory judgment action (bearing Index No. 10873/04) which was dismissed without prejudice at the conclusion of plaintiffs' evidence after a non-jury trial before Justice Michael V. Ajello.

The instant action was commenced five months later based on certain alleged "changed circumstances."

According to plaintiffs, subsequent to Justice Ajello's decision, they attempted to place their home on the market. It is further alleged that Francine Reali of Safari Realty refused to accept the listing due to the widening line, and that a listing with Papp Realty has yet to produce any prospective purchasers. As a result, plaintiffs claim to have demonstrated that "the widening line puts a damper on interest" in their residence. In addition, plaintiffs claim to have consulted Mimi Neuhaus of Neuhaus Realty and Dominic DeSimone, an alleged builder on Staten Island about selling their property, but it remains unsold.

In support of their motion for summary judgment declaring the present map invalid, plaintiffs' contend, as they did previously, that the mapping of the widened street line has made the subject property unsaleable and constitutes "an unconstitutional interference" with their vested rights in the property. To this end, plaintiffs have submitted a copy of a survey which depicts the widening line as running through the front portion of their parcel, including approximately one-half of plaintiffs' house. Also submitted is the affidavit of plaintiff Linda Royal and three unsworn letters: (1) a facsimile addressed to plaintiffs on October 20, 2006 from Francine Reali (a broker/owner of Century 21 Safari Realty) who opines on the basis of her experience that (a) a widening line "has been a deterrent to would be purchasers" and (b) the value of property encumbered by a street widening line "may be dramatically reduced because of the lack of potential the property would then be able to offer"; (2) a letter dated April 17, 2007 from Dominic DeSimone, a purported builder on Staten Island, who states that he would be interested in purchasing the subject parcel provided that the proposed widening line is "extinguished"; and (3) a letter dated April 17, 2007 from Mimi Neuhaus (a real estate broker at Neuhaus Realty) who opines that unless the 40' widening line is removed, the subject property will not be marketable.

Finally, plaintiffs have submitted an unsworn letter dated August 16, 2005 summarizing the results of an appraisal by Valuation Associates Real Estate Appraisers & Consultants regarding the subject property. However, no copy of the appraisal has been provided. According to the appraiser's letter, as of July 28, 2005, the estimated market value of the of the premises "AS IS" is $355,000.00, while the elimination of said widening line would increase its market value to $430,000.00. The appraiser further opines that the property's maximum productive value is in the land, and that the

existing ("widening") easement limits its "AS OF RIGHT" development potential by the indicated $75,000.00.

At the outset, it must be noted that plaintiffs have failed to submit their purported evidence in admissible form (*see* Zuckerman v City of New York, 49 NY2d 557, 563) and, as such, the unsworn letters are of no probative value. In addition, plaintiffs' self-serving and conclusory assertion that the *sole* impediment to the sale of their residence is the negative impact of the street widening line is without any factual basis in the proof.

Finally, even assuming *arguendo* that the brokers' letters were admissible, their conclusory opinions are devoid of any factual basis, and are therefore insufficient to eliminate questions of fact regarding the effect of the proposed widening line on the marketability of the subject property (*see* Briarcliff Assocs. v Town of Cortlandt, 272 AD2d 488, *app dismissed* 95 NY2d 886, *lv denied* 96 NY2d 704). In fact, in view of the current "crisis" in the real estate market, it appears doubtful that plaintiffs' inability to sell the subject premises can be related *solely* to the street-widening easement. Nor is the Court persuaded that the instant matter is analogous to Jensen v City of New York (42 NY2d 1079) where there was an *evidentiary basis* for the court to conclude that the mapping restrictions in that case "made the property virtually unsaleable, and made banks unwilling to provide financing for repairs" (Jensen v City of New York, 42 NY2d at 1080-1081). To the contrary, even the appraisal letter belies plaintiffs' assertion that they are unable to recognize *any* economic value in their property due to the present mapping. Thus, the appraisal indicates that the diminution in value attributable to the instant easement was only 17% as of July 2005. Pertinent in this regard is the principle that it is "[o]nly when the evidence shows that the economic value, or all but a bare residue of the value, of the parcel has been destroyed has a 'taking' been established" (Briarcliff Assocs. v Town of Cortlandt, 272 AD2d at 490, quoting Spears v Berle, 48 NY2d 254, 263; *see* Jensen v City of New York, 42 NY2d 1079, 1080).

In view of the foregoing, plaintiffs have clearly failed to meet their burden of making a prima facie showing of their entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate material issues of fact (*see* Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853).

ROYAL v. CITY

Accordingly, it is

ORDERED, that plaintiffs' motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: FEB. 08 2008

/s/
HON. THOMAS P. ALIOTTA, J.S.C.