SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present: HON. EDWARD G. McCABE
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

In the Matter of Nassau County Acquiring Real Property and Easements for the Improvement of the Intersection of Ocean Avenue and Atlantic Avenue East Rockaway, New York,

INDEX NO.: 06-006982

MOTION SEQ. NO.: 2

Petitioner/Condemnor,

X

The following papers were read on this application:

Order to Show Cause.....1
Reply Affirmation in Opposition (County).....2
Reply Affirmation (Condemnee).....3

The Respondent/Condemnee, Eastcrest Associates, the owner of a ninety-two unit rental apartment building located at the intersection of Ocean and Atlantic Avenues in East Rockaway, N.Y., submits an application seeking an order vacating the Vesting Order, dated May 31, 2007, which vested title to a portion of the Respondent/Condemnee's property described as Section 38 Block 506 Lots 68, 69, 79 and 293 in the County of Nassau and granted Eastcrest an injunction, and restraining the Petitioner/Condemnor, County of Nassau, and any and all agents,

employees, contractors and/or sub-contractors from entering upon or performing any work upon the Respondent/Condemnee's property, pending any further order or judgment of the Court. According to the affidavit of Jeffrey J. Feil, the managing partner of Condemnee, Eastcrest Associates, service of the condemnation was not made upon Eastcrest Associates, nor was the May 31, 2007 Vesting Order. Mr. Feil states the Petitioner/Condemnor County mailed the petition to 134 Wright Road in Rockville Centre, NY, which was Mr. Feil's personal address approximately twenty-eight years ago.

It is further stated, the County subsequently realized service had not been effectuated when the petition sent to the Wright Road address was returned to it unclaimed. The petition was then sent by the County to Mr. Feil's business address at 370 7th Avenue, Suite 618 in New York City subsequent to the return date of the condemnation petition and was received by Mr. Feil's office in late June 2007. The Vesting Order was signed May 31, 2007 and entered on June 6, 2007. The Condemnee argues the County's failure to properly serve Eastcrest Associates with the Verified Petition prior to the return date of May 30, 2007, violated the service provisions set forth in Section 402(B)(2) of the Eminent Domain Procedure Law, as well as Eastcrest's due process rights under the United States Constitution.

In reply, the County explains that prior to vesting, a notice of intent to condemn was mailed, in accordance with EDPL § 402(B)(2), by certified mail, return-receipt requested to the record owners, as their names appeared in the office of the Nassau County Clerk, at the last known address of the owners, believed to be the address where the real property assessment and tax notices were actually sent. The notice was also published and posted at the acquisition site, in conformance with the statute. The County further states they believe it was "unfortunate" the attempt to provide actual notice to Respondent/Condemnee Eastcrest prior to the return date of the vesting motion inadvertently failed. The County concedes the notice was returned as "undeliverable" at the Condemnee's last known address maintained in the records of the County Clerk.

The County cites the case In re Town of North Hempstead Community Development Agency for the Acquisition of a Certain Parcel of Land Located at Prospect Avenue, New Cassell, New York, 2002 N.Y. Slip Op 40496U (N.Y. Misc. August 29, 2002 (McCabe J.S.C.) (hereinafter referred to as "NHCDA), in which this Court rejected an application by the Condemnee, a subsequent purchaser of the subject property, to vacate a vesting order on the grounds that the EDPL Article 2 notice was not effected upon the prior owner. The condemnee in that case purchased the property three years subsequent to the Agency's inclusion

of the property in its' urban renewal plan and the proceedings were commenced six years after the time of the challenged notice. This Court denied the application because the Condemnee failed to offer any proof that service upon the prior owner was defective, but cited EDPL §402(B)(2)(b) which provides "the inadvertent failure to notify any condemnee, whether of record or not, will not invalidate any proceedings brought under EDPL §402(B)(2)." However, the statute clearly specifies "Service shall be made pursuant to the civil practice law and rules and the Condemnor shall serve a notice upon the owner of record of the property to be acquired, as the same appears from the record of the office in which the acquisition map is to be filed. It further provides, if service is made by mail, it shall be sent to the last known address of the owner. The EDPL §103(B-1) equates the tax assessment record billing owner's address, in its' most current form, with the last known owner's address. Had the County complied with this second requirement, it would have satisfied the statutory requirement for service.

The Court agrees with Eastcrest's counsel's argument that this case can be distinguished from NHCDA, supra, in that the failed notice to the Condemnee in that case was inadvertent and was not attributable to the actions of the Condemnor /Community Development Agency, unlike the subject action in which the failed notice was the direct result of the Condemnor/County's failure to ascertain a valid

"last known address" for Eastcrest. Eastcrest has reportedly retained continuous ownership of the subject property for the past twenty-eight years, since title was acquired on June 28, 1979. The correct ownership information and current address were available by reference to the real estate tax payment records maintained by the Receiver of Taxes of the Town of Hempstead which are returned to the County Treasurer on an annual basis. The County can be charged with knowledge of facts which an examination of the real property and tax records reveals." See Congregation Yetev Lev D'Satmar, Inc. vs. County of Sullivan, 59 N.Y. 2d 418, 425; 465 N.Y.S. 2d 879, 884 (1983), cited by the Condemnee. Since the contact information for Eastcrest Associates' was a matter of public record and readily ascertainable, the Court finds the failure to notify it prior to the taking was not inadvertent and cannot be excused as such.

Eastcrest argues its' ninety-two unit, low-income rental apartment building has exactly ninety-two parking spaces available for its' tenants. The subject taking eliminates four to eight of its' parking spaces and the working easement is stated to eliminate twenty parking spaces for an indefinite period of time. Mr. Feil states there is no excess land on the subject property upon which additional parking can be obtained in order to try to compensate for the anticipated loss of available parking spaces through the subject condemnation proceeding. Thus,

approximately twenty-five percent of the building's parking spaces will be substantially adversely impacted by the subject acquisition.

The Court agrees with the Condemnee's position that neither the constitutional due process standards nor the actual notice to the Condemnee requirement of the EDPL were satisfied prior to the entry of the Vesting Order. The County's reliance upon §402(B)(2)(b) is misplaced because this provision only excuses the "inadvertent" failure to notify the Condemnee/Owner, it does not excuse making no effort to ascertain a valid and readily ascertainable "last known address".

As stated previously, the mailing address utilized by the County in the first instance had not been the Condemnee's address for the past twenty-eight years. This is not a minor error. The failure to use the correct post office address in the mailing process to the Defendant results in the Court not obtaining personal jurisdiction of the party upon whom service has been attempted. See, Donahue vs. LaPierre, 99 A.D. 2d 570; 471 N.Y.S. 2d 396 (Third Dept. 1984) and Ludmer vs. Hasan, 33 A.D. 3d 594; 821 N.Y.S. 2d 661 (Second Dept. 2006). It is well-established that C.P.L.R. 308(2) requires strict compliance and that a Plaintiff has the burden of proving, by a preponderance of the credible evidence, that service

was properly made. See McCray vs. Petrini, 212 A.D. 2d 676; 622 N.Y.S. 2d 815 (Second Dept. 1995). In the subject action, the County concedes the address utilized was not a current or valid address for the property owner. The Court notes the cases cited by the County dispensing with the need for the sovereign to give advance notice to the condemnees of its' intention to take their property, such as Fifth Avenue Coach Lines, Inc. vs. New York, 11 N.Y. 2d 342; 229 N.Y.S. 2d 400 (1962), a case decided forty-two years ago, pre-date the 2004 amendments to the EDPL enacted after the Second Circuit found the EDPL, as it existed at that time, to be constitutionally deficient in this respect. See, Realty Law Digest by Scott E. Mollen, NY Law Journal Nov. 7, 2007. The amendments require notice of the public hearing be mailed to affected property owners. See, Brody vs. Village of Port Chester, 509 F. Supp. 2d 269; 2007 US Dist. LEXIS 51901 (July 18, 2007) a condemnation proceeding in which the Court discusses the need for actual notice to the property

owner.

In Brody, supra, the U.S. Court of Appeals held the process afforded by the Village was constitutionally inadequate and remanded the case for a determination of whether the Plaintiff received actual notice of the determination and findings. "Due process requires that a deprivation of property be preceded by notice that is

reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." Brody court citing Mullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306; 70 S. Ct. 652 (1956). See also Mennonite Board of Missions vs. Adams, 462 U.S. 791, 103 S. Ct. 2706 (1983); Schroeder vs. City of New York, 371 U.S. 208, 83 S. Ct. 279 (1962) and McCann vs. Scaduto, 71 N.Y. 2d 164, 524 N.Y.S. 2d 398 (1987).

Eastcrest's legally protected interests are directly affected by the subject acquisition and the notice sent to an address that had not been used by the Condemnee in twenty-eight years, when the valid current tax billing address was readily ascertainable, does not satisfy both tiers of the service requirement set forth in EDPL §402(B)(2) or the due process mandates set forth in the U.S. Constitution.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Vesting Order, dated May 31, 2007, is hereby vacated.

This constitutes the decision and order of the Court.

ENTER:

Dated: February 28, 2008
Mineola, NY

HON. EDWARD G. McCABE
J.S.C.

ENTERED

MAR 0 3 2008
NASSAU COUNTY
COUNTY CLERKS OFFICE

FAX/MAIL TO:

Mindy H. Krauss, Esq.
Deputy County Attorney
Office of the County Attorney, County of Nassau
Department of Tax Certiorari & Condemnation
One West Street
Mineola, NY 11501-4820
Tele: (516) 571-3028
Fax: (516) 571-6604

Donald F. Leistman, Esq.
Koeppel, Martone & Leistman, LLP
155 First Street
Mineola, NY 11501-9857
Tele: (516) 747-6300
Fax: (516) 747-8227