

**Matter of Town of N. Hempstead Community  
Dev. Agency**

2008 NY Slip Op 31083(U)

April 4, 2008

Supreme Court, Nassau County

Docket Number: 3558-05/

Judge: Edward G. McCabe

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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 the Application of the Town of North Hempstead Community Development Agency for the Acquisition of a certain parcel of land known as Section 11, Block 48, Lots 1-20, 62, 66-72, located at 142 Magnolia Avenue at the Northeast corner of Magnolia Avenue and Railroad Avenue, New Cassel, New York, pursuant to the New Cassel Urban Renewal Plan.

Index No.: 3558/05

Motion Seq. No.: 3

X

The following papers were read on this application:

Notice of Motion.....	1
Affirmation in Opposition (Petitioner).....	2
Attorney Affirmation (Respondent/Condemnee).....	3
Memorandum of Law (Petitioner).....	4

PRELIMINARY STATEMENT

This is a motion by Geraldine Savage for an order (i) declaring that she, as Respondent, has complied with the April 18, 2006 Vesting Order's directive to file "written Claim, Demand or Notice of Appearance" by filing a Notice of Appeal of the Vesting Order and a Proof of Claim for damages; (ii) modifying that portion of the

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April 18, 2006 Order which calls for service of the "written Claim, Demand or Notice of Appearance" by October 31, 2006 so as to permit service of such document within 30 days of a determination by this Court; (iii) vacating the Vesting Order and dismissing the Petition; and, (iv) such other and further relief as the Court deems just and proper.

**BACKGROUND**

Geraldine Savage was the owner of a parcel of vacant land at the northeast corner of Railroad and Magnolia Avenues, New Cassel, New York. This land, reported to be approximately 74,575 square feet in area<sup>1</sup> was part of the New Cassel Urban Renewal Plan drafted by the Town of North Hempstead after a hearing in July 2003. The Plan was adopted by resolution of the Town Board on August 12, 2003 and published in Newsday, a newspaper of general circulation as required by Eminent Domain Procedure Law, on August 20 and 21. Pursuant to Eminent Domain Procedure Law § 207(A), the Condemnee had thirty days within which to file a petition for review in the Appellate Division. § 207(C) limits the scope of review to whether (1) the proceeding was in conformity with the federal and state

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<sup>1</sup> It is actually approximately 10,600 square feet less, because Lots 63 - 65 on the Tax Map, Exh.1 to moving papers at p. 5 are not included.

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constitutions; (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law; and (4) a public use, benefit or purpose will be served by the proposed acquisition.

Ms. Savage did not file a petition with the Appellate Division, and thereby, pursuant to § 207(B), effectively foreclosed consideration by state courts of the claims set forth in the Affirmative Defenses and Counterclaims. Instead, she removed the matter to Federal Court on April 20, 2005, and on June 3, 2005 the Town of North Hempstead moved to remand to this Court. By Order dated March 23, 2006, Hon. Thomas D. Platt, U.S.D.J., adopting the report of U.S. Magistrate Judge James Orenstein, dated March 13, 2006<sup>2</sup>, remanded the matter to the Supreme Court.

Soon thereafter, on April 18, 2006, this Court signed the Vesting Order, which directed that purported owners, or their attorneys, file a written Claim, Demand or Notice of Appearance on or before October 31, 2006<sup>3</sup>. Neither the Condemnee nor her attorney filed any such document by the date set by the Court.

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<sup>2</sup> (See, Exh. 3)

<sup>3</sup> (See, Exh. 4)

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Successor counsel did file a Proof of Claim dated August 27, 2007, but it was rejected by counsel for the condemnors as untimely.<sup>4</sup>

Instead of filing a timely written Claim, Demand or Notice of Appearance, as directed in the Vesting Order, Condemnee filed a notice of appeal of the Vesting Order.<sup>5</sup> By Order to Show Cause returnable on November 9, 2006, she sought a stay of the Vesting Order, which resulted in a stipulation whereby the Condemnor would take no action to secure the parcel, and would continue the status quo, and Condemnee-Appellant agreed to maintain in force all policies of insurance.<sup>6</sup> Of note is the fact that the Notice of Appeal identifies the Condemnee/Respondent as Dr. Margaret Savage, owner of the subject property.<sup>7</sup>

Among the clauses in the Order to Show Cause and Temporary Restraining Order, dated October 23, 2006<sup>8</sup>, is the following decretal paragraph: "ORDERED

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<sup>4</sup> (See, Exh. 14)

<sup>5</sup> (See, Exh. 5)

<sup>6</sup> (See, Exh. 6)

<sup>7</sup> (See, Part of Exh. 5)

<sup>8</sup> (See, Exh. 6)

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that Petitioner, Dr. Margaret Savage (Appellant), be granted leave to file a petition for review of the condemnor's determinations and findings, pursuant to Eminent Domain Law § 207." This, despite the fact that Dr. Margaret Savage has never been determined to be the owner of the property, and the time to file a petition with the Appellate Division, pursuant to § 207, is statutorily limited to thirty days from the completion of publication, which in this case was August 21, 2003.

No petition under § 207 was filed, and on June 1, 2007 the Appellate Division denied the non-party appellant's motion to stay the Vesting Order of August 11, 2006, and the cross-motion by the respondent to vacate the temporary restraining order was denied as academic. The motions had been held in abeyance pending the appointment of a representative for the deceased appellant.<sup>9</sup> Letters Testamentary for Margaret Thomas Savage a/k/a Margaret Savage were issued by the Nassau Surrogate's Court on September 5, 2007.<sup>10</sup>

By letter dated August 28, 2007, the appeal from the grant of the Vesting Order was withdrawn.<sup>11</sup> The motion presently before the Court seeks a

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<sup>9</sup> (See, Exh. 11)

<sup>10</sup> (See, Exh. 8)

<sup>11</sup> (See, Exh. 13)

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determination that the Condemnee/Respondent Geraldine Savage has complied with the Vesting Order's direction that a written Claim, Demand or Notice of Appearance be filed on or before October 31, 2006 because she filed a Notice of Appeal from the April 18, 2006 Vesting Order and perfected her appeal within the time set by the Appellate Division. Alternatively, she seeks a modification of the Vesting Order, so as to delete the date of October 31, 2006 as the last date for filing, and substitute a date within thirty days of the grant of such relief by this Court. Another requested alternative form of relief is vacatur of the Vesting Order and dismissal of the Petition.

#### DISCUSSION

The Condemnee has gone to extraordinary lengths to avoid doing the two relatively simple acts which would have obviated this problem. In order to seek review of the Determination and Findings of the Condemnor, she had thirty days from August 21, 2003 to petition the Appellate Division. She was rebuffed in her efforts to seek the shelter of the Federal Courts, essentially because allegations raised in affirmative defenses or counterclaims are not sufficient to raise a federal question pursuant to 42 U.S.C. § 1983. When title to the premises vested in the Condemnor by virtue of the Vesting Order dated April 18, 2006, entered on August 11, 2006 in

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the Nassau County Clerk's Office, she had until October 31, 2006 to serve the requisite written claim, demand or notice of appearance. But she did not.

In *Grandinetti v. Metropolitan Transportation Authority*, 74 N.Y.2d 785, 787, 545 N.Y.S.2d 94, 95, 543 N.E.2d 737 (1989), the Court affirmed the denial by the Appellate Division of an extension of the time within which to file a written claim, demand or notice of appearance where the claimant furnished neither an affidavit of merit nor reasonable excuse for failure to meet the filing deadline set by the Court. Importantly, however, the Court noted that "the time specified by a court pursuant to this provision is not a Statute of Limitations. Nor is it a condition precedent, compliance with which is ordinarily deemed a necessary element of the claim." Rather, the time limit established according to Eminent Domain Procedure Law § 503(B) "is merely a procedural direction to be issued by the court in the exercise of its' broad discretion to administer the litigation in an orderly and expeditious manner. As such, the court may extend the time fixed by its' own prior order 'upon such terms as may be just and upon good cause shown'. (CPLR 2004)."

The issue to be decided then, is whether the Condemnee should now be permitted to assert her right to demand further compensation from the Condemnor, despite having failed to file the requisite documents by October 31, 2006. For a

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variety of reasons, and in the interests of justice, the Court believes that the Condemnee, or her attorney, should be permitted to file the documents identified in Eminent Domain Procedure Law § 503(B) nunc pro tunc.

As an initial consideration, the Condemnor was fully apprised of the Condemnee's disagreement with the condemnation process and the advance payment of \$1,150,000. While the Answer to the Petition predated the Vesting Order, it nevertheless put the Condemnor on notice. Thereafter, throughout the appellate process, as well as the removal and remand proceedings, there could be no question but that the Condemnee did not intend to accept the aforementioned sum in full payment for the taking of her property.

Secondly, without reaching any conclusions on the issue of value, it is clear from a cursory reading of the preliminary appraisal report<sup>12</sup> on which the advance payment was based, that it may require adjustment.

Relying on the Direct Sales Comparison Approach, the appraiser considered the sales of four vacant residential plots within the area.

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<sup>12</sup> (See, Exh. 1)

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Each of the comparable sales were individual building plots of between 5,000 — 7,425 square feet. In making a size adjustment at page 12 of the report, the appraiser treats the subject as if it were one single building plot, and makes negative adjustments for size ranging from 25% — 35%. In reality, the parcel consists of multiple single family plots, with a minimum of 5,000 square feet, as mandated by the applicable zoning.<sup>13</sup> The comparison of the comparable sales to a 5,000 square foot vacant parcel would require minimal adjustments on the square foot basis selected by the appraiser, and most of the adjustments would be upward, rather than downward. In addition, the appraiser penalizes all of the subject parcels because of their alleged frontage on Railroad Avenue. In fact, an inspection of the tax map<sup>14</sup> shows that only five of the available plots face Railroad Avenue. Simply stated, there may be reason to believe the value of the parcels set forth in the preliminary appraisal, require adjustment.

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<sup>13</sup> (Subject is R-C zoned as per report at page 10)

<sup>14</sup> (See, Appraisal Report at page 5)

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The very first pronouncement of the Eminent Domain Law § 101 is that, one of the primary purposes of the law is "to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of the power of eminent domain." To hold otherwise would violate the N.Y.S. Const. Art. 1 § 7, which prohibits the taking of private property without just compensation. Precluding the Condemnee from substantiating her right to seek additional compensation under the facts presented herein would be unconscionable.

In granting the extension of time, the Court is also mindful of the following:

1. While the Vesting Order was signed on April 18, 2006, it was not entered in the Office of the Nassau County Clerk until August 11, 2006, two and one-half months before the last day for filing;
2. Shortly after the Vesting Order was entered, in November 2006, the Condemnee's mother, Margaret Savage, died;
3. While the Eminent Domain Procedure Law § 503(B) provides for the service of a claim or notice of appearance with a time to be established by the Court, subdivision (A), dealing with takings by the State of New York, requires such service only within three years;

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4. There was a period of almost one year (April 20, 2005 — March 23, 2006) during which the matter was sub judice in the Federal Court and the matter was out of the control of this Court;

5. The Condemnor was agreeable to a stipulation staying the proceeding, pending the determination of the Appellate Division with respect to the motion to stay enforcement of the Vesting Order;<sup>15</sup>

6. There has been no showing that the public taking will be unduly prejudiced or delayed by permitting the Condemnee to claim additional damages beyond the advance payment which has been tendered.

**CONCLUSION**

The motion by Condemnee Geraldine Savage is granted to the limited extent that the Condemnee/Respondent is directed to file a Proof of Claim for Damages Resulting from Condemnation Proceeding as provided for in the Eminent Domain Procedure Law § 503, within thirty days of the service of a copy of this Order with

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<sup>15</sup> (See, Exh. 6 and 14)

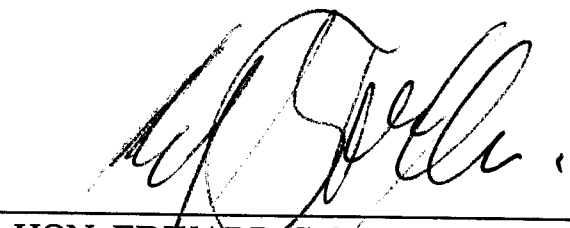
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Notice of Entry, and that such document shall constitute a valid claim in accordance with that statute, and the motion is, in all other respects, denied.

This constitutes the decision and order of the Court.

ENTER:

Dated: April 4, 2008  
Mineola, NY



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

**ENTERED**

APR 11 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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