

**Matter of Board of Comms. of Great Neck
Park Dist. of Town of N. Hempstead v Kings
Point Hgts., LLC**

2009 NY Slip Op 30459(U)

February 18, 2009

Supreme Court, Nassau County

Docket Number: 01-5483

Judge: Edward G. McCabe

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

Present: **HON. EDWARD G. McCABE**
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

In the Matter of the Application of

Index No.: 01-5483

**The Board of Commissioners of the
Great Neck Park District of the Town of North
Hempstead Acquiring a Parcel of Real Property at
100 Kings Point Road in the Village of Kings Point
adjacent to Steppingstone Park, as Shown on the
Acquisition Map Entitled "Acquisition Map of
Cohan Estates Property for the Great Neck Park
District" dated December 5, 2000 (as corrected),
Town of North Hempstead, Nassau County,
New York, and described on the Nassau County
Land and Tax map as Section 1, Block 144,
p/o Lot 50 and Lot 51, which Parcel is being
acquired for Park Purposes,**

Motion Sequence No.: 6

Petitioner/Condemnor,

Claimant:

Kings Point Heights, LLC

X

The following papers were read on this application:

| | |
|--------------------------------|---|
| Notice of Motion..... | 1 |
| Affirmation in Opposition..... | 2 |
| Reply Affidavit..... | 3 |

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)

2.

Counsel for Condemnee/Claimant, Kings Point Heights, LLC, submits an application for an order setting aside the Judgment entered on February 7, 2008 and setting a new date for settlement of Judgment and directing the re-settled Judgment: a.) include the reimbursement of \$55, 671.39 in real estate taxes paid by the Claimant on the property acquired in this proceeding, adjusted as of the day of taking, pursuant to the EDPL §702, and b.) awarding Claimant an additional \$196,726.12, pursuant to EDPL §701, for reimbursement of actual and necessary costs, disbursements and expenses, including attorneys fees, appraisal fees and expert engineer fees, actually incurred in the prosecution of its' claim.

Claimant's counsel advises the Court it was his intention to submit a counter proposed judgment for signature which would have included EDPL §701 and §702 provisions, but a series of unexpected events, including the departure of a former partner of their firm, the serious illness of a member of his immediate family requiring his presence out-of-state for a month and a misunderstanding between counsel about an agreement to adjourn the settlement date for the proposed judgment, resulted in the submission of the judgment without the counter judgment. The Court accepts the foregoing explanation and deems the instant application timely. See, General Crushed Stone Co. vs. State of NY; 93 N.Y. 2d 23, 686 N.Y.S. 2d 754 (1999) in which the Court of Appeals held "in light

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)

3.

of the purpose of the statute, an application for an additional allowance can, but need not be brought after the entry of a valuation judgment....section 701 has no limitation for the timing of an application for an additional allowance award.”

Claimant’s application for an additional award is based upon EDPL §701 which provides:

“In instances where the order or award is substantially in excess of the amount of the condemnor’s proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its’ discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee.”

The record reflects the Condemnor’s original offer was for an advance payment in the amount of \$2.4 million dollars and after trial, the Court awarded the full amount of the Claimant’s value estimate for the parcel actually acquired in the amount of \$2,950,000. Thus, the final award was \$550, 000.00 or 22.9% in excess of the Condemnor’s original proof of value and \$950,000.00 in excess of the Petitioner’s trial appraisal.

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)

4.

In opposing the application, the Claimant/Condemnee cites numerous cases in which the Courts have found awards which exceed the original offer of proof by a mere 20% justify the exercise of discretion in the denial of an application for an additional award. See, In the Matter of Johnson City vs. Waldo's Inc., 277 A.D. 2d 773, 715 N.Y.S. 2d 775 (November 2000) wherein an \$81,669.00 or 19% of the original offer was found to be insufficient; County vs. Tompkins, 298 A.D. 2d 825, 749 N.Y.S. 2d 332 (Third Dept. 2002) where the final award was \$65,000.00 or 22.8% more than the original offer and the Court found the 22.8% difference failed to meet the threshold standard of substantial. In CMRC, Ltd. vs. State of New York, 16 A.D. 3d 204; 790 N.Y.S. 2d 601 (First Dept., 2005), the Appellate Division found the lower court properly exercised its' discretion in the denial of an award for an additional allowance where the pre-trial offer was \$4.865 million and the final award was \$5,854,550.00 slightly less than a million dollar difference.

Cases which have supported an additional allowance award include In the Town of Riverhead vs. LoboZZo, 207 A.D. 2d 789, 616 N.Y.S. 2d 973 (Second Dept. 1994), wherein the Court found an increase of \$47,640 or 30% over the initial offer was sufficient to sustain an EDPL §701 additional award. The New York City Transit Authority (Gun Hill Bus Depot), 42 Misc. 2d 629 at p. 634, 538 N.Y.S. 2d 161(1989) case held an award which was 36% and \$656,000.00 above

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)**5.**

the initial offer was sufficient to justify an additional allowance award. The Court first referred to the dictionary for a definition of substantial which read “of ample or considerable amount” and “of real worth, value or effect”. It is further listed the antonym of “substantial” as being “immaterial”. This Court ultimately found that from the view of a percentage and a dollar amount, both 36% and \$656,000.00 are “substantial”. The Court also referred to the Governor’s memorandum of approval for the amendment to EDPL §701 (also cited by Claimant) which states in pertinent part “that recovery of the additional out-of-pocket expenses should be limited to where the condemnee “has proven more than a modest increase in value.” (1987 McKinney’ Session Laws of NY, at A-1076) concluding “it should not be belabored that the amount here involved (\$656,000.00) is not a modest increase over the proof of value of the condemnor. A case entitled Gelsomino vs. City of New Rochelle, 25 A.D. 3d 554, 809 N.Y.S. 2d 122 (Second Dept. 2006) is another example of an action in which the court found a \$110,000.00 or 35.5% increase between the original offer and the final award was sufficient to justify an additional award. In that case the Condemnor’s original offer was \$310,000.00 and the Court awarded \$420,000.00. In a case entitled, In the Matter of the Town of Islip vs. Jean Sikora, 220 A.D. 2d 434, 632 N.Y.S. 2d 160 (Second Dept. 1995),

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)**6.**

the Second Dept. recomputed the final award and upheld the lower court's determination that the \$754,207.00 award was substantially in excess of the Condemnor Town's \$550,000.00 offer of proof and that an additional award for fees and disbursements were actual and necessary for the Condemnee to obtain just compensation. Thus, the Sikora court found an increase of approximately \$200,000.00 or 27% to be a sufficient basis for granting an application for a \$701 additional award. This Court finds similarities between the Second Dept.'s decision in the Sikora case and the subject action in that they both involve substantial dollar amount increases, \$200,000.00 and \$550,000.00, and comparable percentages, 27% and 22.9%.

Based upon a review of all the cases cited and the facts and circumstances of this particular action, this Court will exercise its' discretion in reaching the determination that the \$550,000.00 or 22.9% increase, between the Condemnor's original offer of \$2.4 million and the final award of \$2.9, million is clearly sufficient to satisfy the "substantial test", particularly in today's economy. The Court further finds an additional award is necessary for the Condemnee to achieve just and adequate compensation, as the property values determined for the final

award did not incorporate the expenses necessarily incurred by the Condemnee to obtain just compensation in this proceeding.

Real Estate Tax Payment Reimbursement

The Claimant also seeks reimbursement, pursuant to EDPL §702, for pro rata real estate taxes paid on the portion of the property acquired by Condemnor calculated from the date of the vesting order to the date the re-apportionment of the acquired property became effective which was October 1, 2005 for school taxes, January 1, 2006 for town taxes, and May 31, 2005 for village taxes. The affidavit of Mr. Santemma requests real estate tax reimbursement in the amount of \$123,714.19 and Claimant's supporting affidavit, by Kiumazz Geula, principal owner of Kings Point, LLC, requests \$55,671.39. Further clarification is required. In Mr. Geula's affidavit, he explains Claimant paid all the real estate taxes on lots 50 and 51 from the date of vesting on May 23, 2001, until lot group 50 was re-apportioned for the 2005/06 tax year. A copy of the old tax map is provided as exhibit "F". According to Mr. Geula, the Condemnor never obtained an apportionment of the tax lot prior to the 2005/06 tax year, so the assessment allegedly reflected a gross acreage value for the combined lot 50 and 51. A copy of the tax map showing the reapportioned lots is included as Claimant's exhibit "G".

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)**8.**

The EDPL §702(a) provides as follows: “The Condemnor shall reimburse a Condemnee an amount separately computed and stated, representing the following incidental expenses.... (3) the pro rata portion of the real property taxes, water rents, sewer rents, special ad valorem taxes and other charges paid or payable to a taxing entity which are allocable to a period subsequent to the date of vesting title or the effective date of possession of such property in the Condemnor, whichever is earlier.” Clearly the statute supports the pro rata real estate tax payment reimbursement, but as Petitioner points out, in order to receive a specific award for real estate tax reimbursement, the Court requires copies of the tax receipts or certified paid tax records. It is not clear to the Court if there was a delay in the reapportionment of the tax lots, but it appears either the Condemnor or the Claimant could have initiated the apportionment application. It would seem likely that the Condemnor might want to initiate the application, particularly if they intended to file for a real estate tax exemption. The record doesn’t indicate if the Park District applied for an exemption or if it was eligible for a cancellation of taxes on the property acquired. The typed summary of taxes paid and calculations for reimbursement by Claimant’s counsel is useful and absent any objection by the Condemnor to the determination that the Condemnor’s share of the taxes assessed on the condemned parcel is 27%, the Court will apply that percentage when

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)

9.

evaluating any renewed application for real estate tax payment reimbursement. However, Claimant does need to support his request for reimbursement with copies of the paid tax receipts or certified copies of the paid real estate taxes from the Nassau County Treasurer's Office and the Village's paid tax records for the payments in question. The Court needs to verify who paid the taxes and the specific amounts paid in order to decide who is entitled to the reimbursement and in what amounts. The Condemnor claims the subject property was timely subdivided and that the taxes were apportioned as of that date to allow the sales to proceed. Perhaps the paid tax records and an affidavit of a representative from the County Assessor's Office and the Village's real estate tax collection division and further information as to the subdivision and sales of the remaining parcels will assist in the clarification of this issue. This information should be clear from an examination of the relevant public records. The Court cannot make an award for real estate tax reimbursement without the information requested.

Attorneys' Fees

The Claimant requests reimbursement of Attorneys' Fees paid to the initial law firm retained, Blank, Rome, Kinzerand and Greenblatt, for legal services they provided at the time of acquisition in the preparation of the filing of the original

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)**10.**

appraisals and analysis which was billed on a hourly basis and paid in the amount of \$103,189.76. They also seek \$50,000.00 paid to the firm of Santemma & Deutsch who were retained in 2002 to go forward with the condemnation case. The retainer provided for the initial \$50,000.00 payment, plus a contingency fee for all sums received in excess of three million dollars. Since the final award was under three million dollars, no contingency fee was paid. The Claimant states its' out-of-pocket legal expenses total \$153,189.76.

The amount of attorney's fees awarded pursuant to a contractual provision is within the Court's sound discretion, based upon such factors as time and labor required. See, Sol Bluestar, LLC vs. Canarsie Hotel Corp., 33 A.D. 3d 986 (Second Dept. 2006). See also, Matter of Ury, 108 A.D. 2d 8116 (Second Dept. 1985). Legal fees are awarded on a quantum meruit basis and cannot be determined summarily. Though there are detailed invoices of services rendered by the Blank, Rome law firm, no affirmation of services is attached to the moving papers and Santemma & Deutsch do not provide an affirmation of services with an itemized breakdown of services performed, date performed, by whom, hourly billing rates, etc. The Court is not able to determine if any of the charges are for duplicative services. The portion of the application for legal fees must be denied, without prejudice to renew upon the submission of proper papers.

Appraisal Fees

The Claimant requests reimbursement of \$27,382.50 in fees paid to Michael Haberman Associates for the preparation of the original appraisal, trial preparation and attendance at trial and in connection with the preparation of the rebuttal appraisal including the before and after analysis of the property. The Court will grant reimbursement of this expense, finding it to be sufficiently substantiated and necessary to establish the value of the subject property.

Engineering Services

Claimant retained Cameron Engineering for expert analysis required for the configuration, condition of the sea wall and other engineering analysis related to the vacant land, analysis of the Condemnor's reports and his testimony in this matter. The award for Cameron's engineering reimbursement is limited to the reports and analysis totalling \$9, 592.04, as the Court did not accept the Claimant's submission of highest and best use.

Claimant's expense in retaining P.W. Grosser as the engineer who addressed the placement of a dock on the subject property was reportedly part of the Claimant's overall cost of subdivision and development plan. The total charges of \$7,444.58 are stated to be for materials prepared for trial and testimony. Claimant contends the fact of the waterfront, navigable water and dock potential

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)**12.**

were all relevant on the value reached by the Court and taken into consideration in granting the final award. The Court has taken this into consideration, but is unable to make an award for this expense without a detailed bill showing the services performed. The Condemnor correctly points out that the billing summary provided does not appear to match the amount charged.

Ecological Services

The Claimant states it also incurred a \$5,000.00 expense for ecological services, however no invoices, cancelled checks or description of services rendered is provided to justify reimbursement. The Court must therefore deny this portion of the reimbursement application, without prejudice to renew upon the submission of proper documentation to justify reimbursement.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the portion of the Claimant's application which seeks an additional award, pursuant to EDPL §701, is granted; and it is further

ORDERED, that the Court hereby directs the Condemnor to reimburse the following documented expenses of the Claimant/Condemnee:

| | | |
|---------------------------------------|---|--------------------|
| Cameron Engineering | - | \$ 9,592.00 |
| Appraisal fees by Michael Haberman | - | <u>\$18,250.00</u> |

GREAT NECK PARK DISTRICT (INDEX NO. 01-5483)

13.

Total Documented Expenditures
Eligible for Reimbursement
at this time..... \$27,842.00

and it is further

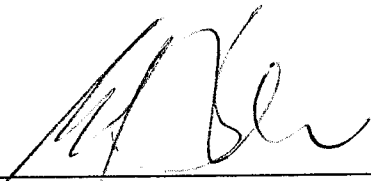
ORDERED, that an award for the pro rata real estate taxes, engineering services provided by P.W. Grosser, ecological services, and attorneys' fees are denied, without prejudice to renew, upon the submission of proper documentation justifying the reimbursement claimed as described in this order.

Any other relief requested which has not been specifically granted, is hereby denied.

This constitutes the decision and order of the Court.

ENTER:

Dated: February 18, 2009
Mineola, NY



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

ENTERED
FEB 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

FAX/MAIL TO:

JON M. SANTEMMA, ESQ.
Santemma & Deutsch, LLC
575 Underhill Blvd., Ste. 222
Syosset, NY 11791
Tele: (516) 496-8300
Fax: (516) 496-8303

ANDREW CANGEMI, ESQ.
Herman, Katz, Cangemi
& Clyne, LLP
400 Garden City Plaza, Ste. 206
Garden City, NY 11530
Tele: (516) 741-1130
fax: (516) 741-1173

SAUL R. FENCHEL, ESQ.
Siegel, Fenchel & Pedy, P.C.
249 South Street
Oyster Bay, NY 1771
Tele: (516) 294-8880
Fax: (516) 294-8881