

**Matter of Metropolitan Transp. Auth. (Fulton St. Tr.
Ctr. Project Phase 2)**

2009 NY Slip Op 31851(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 401164/08

Judge: Walter B. Tolub

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART _____

Index Number : 401164/2008

METROPOLITAN TRANSPORTATION

vs.

FULTON STREET TRANSIT

SEQUENCE NUMBER : 002

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/10/09

WALTER B. TOLUB

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
In the Matter of the METROPOLITAN
TRANSPORTATION AUTHORITY, relative to
acquiring title in fee simple absolute to
certain real property, and terminating the
private interests in vaults in certain New
York City sidewalks, required for the

FILED
AUG 18 2009

COUNTY CLERK'S OFFICE
NEW YORK

FULTON STREET TRANSIT CENTER PROJECT
Phase 2

BLOCK 79, LOT 15; BLOCK 79, LOT 16;
BLOCK 79, LOT 18; BLOCK 79, LOT 19;
BLOCK 79, LOT 21 (FEE AND VAULTS);
BLOCK 79, LOT 25; BLOCK 79, LOT 26 (VAULTS)
as said property in shown on the current
Tax Map of the Borough of Manhattan, City
and State of New York.

Index No. 401164/08
Mtn Seq. 002

-----x
Claimant: 192 BROADWAY JEWELERS, INC.
d/b/a RENAISSANCE JEWELERS
-----x

WALTER B. TOLUB, J.:

This is METROPOLITAN TRANSPORTATION AUTHORITY'S (MTA) motion
to modify this Court's order dated May 12, 2009, to compel 192
BROADWAY JEWELERS, INC. d/b/a RENAISSANCE JEWELERS (Claimant) to
remit \$89,375.70 plus interest.

Facts

The MTA acquired title to Block 79, Lot 15, as designated in
the City Tax Map for the Borough of Manhattan, on March 29, 2006.
Claimant filed a Notice of Claim with respect to its fixtures.
MTA made an initial payment to Claimant, which was received on
July 26, 2006 in the principal amount of \$46,435 plus \$2,2447.73

in interest.

On August 11, 2006, the MTA Claimant, and Mr. Robert Gottlieb [Claimant's attorney] of the Law Firm Goldstein, Goldstein, Rikon and Gottlieb, P.C., entered into an agreement (Agreement). The Agreement provided that MTA would make an additional advance payment of \$95,000 to secure Claimant's agreement to vacate the premises by a date certain. The Agreement also provided that if the Court's final award was less than \$95,000 above the initial advance payment, Claimant would repay MTA the difference along with interest. Paragraph 4 of the Agreement states:

4. MTA will pay Renaissance Jewelers on or before the Penalty Date \$95,000 as an additional advance payment, with interest at 9% from the Vesting Date until the Penalty Date; *provided however*, that **Renaissance Jewelers and the Law Firm** shall pay back to the MTA: (I) the amount, if any, above the principal of the final fixture award due Renaissance Jewelers is less than \$95,000 above the principal amount of the initial advance payment and (ii) the interest paid by MTA to Renaissance Jewelers on any such amount.

(MTA Ex. C [*bold emphasis added*]).

Pursuant to the Agreement, the MTA made the additional advance payment to Claimant on September 7, 2006. Claimant received \$95,000 plus \$3,982.19 in interest.

A trial was conducted to determine the value of the fixtures. This Court rendered its decision determining that the value of the fixtures was \$55,645 and directed the parties to

Settle the Judgment.

Prior to the Judgment being settled, the MTA brought this motion to compel Claimant to payback overpayments made by the MTA in the amount of \$85,780 plus \$3,595.70 in interest pursuant to the Agreement.

Claimant argues that this motion is barred by *res judicata*.

Discussion

At the time of trial, this Court was unaware of the Agreement between the parties prior to this motion being made by the MTA and therefore gave no consideration to the terms entered into between the MTA, Claimant and Claimant's attorney.

Eminent Domain Procedure Law (EDPL) §304[H] provides that:

When an advance payment to a condemnee made pursuant to this section by the condemnor exceeds the award of the court for that property, the court shall, on motion, enter judgment in favor of the condemnor for the amount of such excess and appropriate interest. Such motion shall be made on notice served within thirty days after delivery to the condemnor of the decision of the court making the award.

(EDPL §304[H])

It follows that the MTA is entitled to the difference in the principal amount between the advance payment and the final award as determined by this Court and that the decision dated May 12, 2009 should be modified accordingly.

Accordingly, it is


ORDERED that this Court's decision dated May 12, 2009 is

modified to the extent that Claimant is directed to remit MTA's overpayments in the amount of \$89,375.70 plus interest at a rate of 9%; and it is further

ORDERED that the parties are to settle judgment providing for an award in favor of the MTA as outlined herein.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/12/09



HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK