

Matter of Town of Brookhaven
2009 NY Slip Op 32959(U)
December 18, 2009
Supreme Court, Suffolk County
Docket Number: 07639/2009
Judge: John C. Bivona
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SHORT FORM ORDER

INDEX NO.: 07639/2009

Date of Decision: 12/18/09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 2 SUFFOLK COUNTY

Present:

HON. JOHN C. BIVONA
Justice

MOTION DATE: 11/18/09
SUBMIT DATE: 11/18/09
MOTION: 001 - MG

-----X
In the Matter of the Application of
the TOWN OF BROOKHAVEN and THE TOWN:
BOARD OF THE TOWN OF BROOKHAVEN To
Acquire Certain Property to Be :
Acquired for Public Purposes As Set
Forth on Maps Showing Property to :
Be Acquired, in the Vicinity of the
North Side of South Street, East :
of Wading River Road, Manorville,
Town of Brookhaven, County of :
Suffolk, State of New York. :

Reputed Property Owner:
Aspen Creek Estates, Ltd., :
-----X

PLTF'S/PET'S ATTY:
KAREN M. WILUTIS
Brookhaven Town Attorney
By: Harvey B. Besunder Esq
One Suffolk Square
Islandia, N.Y. 11749

DEFT'S/RESP'S ATTY:

RUSKIN, MOSCOU &
FALTISCHEK, P.C.
1425 RXR Plaza
Uniondale, N.Y. 11556

The Court in its deliberations has considered:

- 1. Notice of Petition and supporting papers;
- 2. Verified Answer;
- 3. Petitioner's Memorandum of Law;
- 4. Respondent's Brief.

This is a special proceeding commenced under the **Eminent Domain Procedure Law**. On the return date of the proceeding, counsel for Petitioner and the reputed owner appeared. Oral argument was taken in an informal setting, and thereafter, the parties submitted a Memorandum of Law/Brief.

Petitioner alleges without dispute that it is a municipal corporation to which

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Respondent asserts a lack of knowledge or information sufficient to form a belief.

In paragraph “2” of the Verified Petition, Petitioner claims that it seeks to acquire certain property for the purposes of: preserving open space and agricultural resources; preserve prime agricultural soils, detect and promote continuation of agriculture in the Township; ensure the retention of scenic vistas; protect the bucolic and rural character of the subject property and adjoining properties and the Manorville Farm Protection Area; preserve the largest belt of working farmland remaining in the Township of Brookhaven. Respondent denied those allegations as recited in paragraph “2” of the Petition.

Petitioner seeks to acquire title in “fee simple absolute”. Respondent claims to lack knowledge or information sufficient to form a belief. In paragraph “7” Petitioner alleges compliance with **Article 2** of the **Eminent Domain Procedure Law**. Petitioner further alleges that: it made appropriate determinations and findings; it held a public hearing on notice; it passed appropriate resolutions, after holding a public hearing on March 7, 2007, finally adopting a resolution incorporating findings and determinations, together with approval of maps authorizing the acquisition of lands appearing on the Suffolk County tax map as District 200, Section 508, Block 1, Lot 15.1. In its Verified Answer Respondent denied all allegations in paragraphs “7” to “11” inclusive.

With respect to paragraphs numbered “12” through “15” of the Verified Petition, referring in part to the appellate history, following the legislative process as set forth in **Article 2** of the **Eminent Domain Procedure Law**, Respondent refers the Court to various decisions and documents as enumerated for the full terms and legal significance thereof. In response to the allegations in paragraphs

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numbered “16” and “17” of the Verified Petition, which paragraphs give the specific location and identify the property in question, informing the Court of the compliance with the requirements of **Eminent Domain Procedure Law §204**, Respondent states in its Verified Answer that it lacks knowledge or information sufficient to form a belief with respect to those allegations.

As to statements contained in paragraphs numbered “18” and “19” of the Verified Petition in which reference is made to the **Environmental Conservation Law** and the consequences of the impact on the environment or the residents of the area in which the property is located as well as a restatement of the public purpose to be served, Respondent denies all allegations in paragraph numbered “7” of its Verified Answer. Further, in paragraph “8” of the Verified Answer, Respondent pleads a lack of knowledge or information with respect to the statement by Petitioner in paragraph “20” of the Verified Petition as it addresses the filing of the Notice of Publication.

Respondent concedes in paragraph “9” of its Verified Answer that an offer to purchase the subject property was made by Petitioner and subsequently accepted by Respondent. Attached to the Verified Petition are Exhibits “A” through “L”. Included in the Verified Answer are four (4) **Objections in Point of Law**.

As its first **OBJECTION IN POINT OF LAW**, Respondent alleges that the vesting map should not be filed, nor the vesting of title be authorized, without compelling Petitioner to effectuate the advance payment of \$4,004,000.00 to Respondent. As Respondent correctly states in paragraph “12” of its Verified Answer the Condemnor is required prior to or subsequent to the acquisition of real

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property to make every reasonable and expeditious effort to justly compensate the owner of the property (**EDPL §301**). Apparently, Respondent does not concede that the Petitioner complied with the dictates of **EDPL §207**.

Respondent alleges that plaintiff has failed and or refused to make the advance payment, plus interest, as required by **Article 3** of the **Eminent Domain Procedure Law**. Consequently, Respondent argues that the proposed Vesting Order is deficient because Petitioner will be permitted to file the Acquisition Map and take title without requiring Petitioner to make an advance payment.

Eminent Domain Procedure Law §301 is a declaration of policy of the State of New York, referring to all stages of an eminent domain proceeding, addressing the issues of negotiation and agreement. **Eminent Domain Procedure Law §302** indicates the concern of the legislature with respect to pre-vesting discovery and the imposition of the obligation to appraise and determine the value of the real property prior to appropriation.

Eminent Domain Procedure Law §301 addresses the issue of “offer”, requiring the Condemnor to establish an amount which it claims would represent just compensation. The Condemnor is further required to make a written offer to acquire the property in an amount equal to one hundred percent (100%) of the approved appraisal. It is further directed that the Condemnor offer its highest approved appraisal, and that the offer, where practicable, be made prior to acquiring the property. **Eminent Domain Procedure Law §305** addresses the issue of use and occupancy as it applies to tenants and the reputed owner, remaining in possession of the subject property post- title vesting.

Eminent Domain Procedure Law §304 addresses the concept of advance

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payment. Apparently, the reputed owner accepted the pre-title vesting offer, with a reservation of rights. As the statute states, the Condemnee may elect to accept such offer as an advance payment, and such election shall in no way prejudice the right of a Condemnee to claim additional compensation (**EDPL §304 (A), (3) and (4)**).

The parties are advised that the advance payment shall not be conditioned on a waiver of any other right. For the first time in **Eminent Domain Procedure Law §304 (C)** we find a reference to the obligation to pay interest as it addresses the “condemnor’s obligation to pay interest on the amount of the offer...”.

Eminent Domain Procedure Law §304 (D) states that “a deposit pursuant to this section shall terminate the condemnor’s obligation to pay interest on the amount so deposited provided that interest is paid on such deposit”.

As stated by the Court of Appeals in **Adventurers Whitestone Corp v. City of New York**, 65 N.Y.2d 83, 489 N.Y.S.2d 896 (1985): “Interest on a condemnation judgment is paid to compensate for delay in payment of the award and is payable at such rate as is fixed by statute. Interest on the value of the property *taken (emphasis added)* is required.... as a substitute for the beneficial use of the property during the period between the date of the taking and the date of the final judgment” (*supra* at p.85). Of interest, is the analysis distinguishing pre-judgment interest from post-judgment interest. The Court couched its distinction on the element of use, or restating that interest accruing prior to an award is paid as a substitute for the beneficial use of property, quoting from **Rochester Carting Co. v Levitt**, 36 N.Y.2d 264, 367 N.Y.S.2d 242(1975). The Court further commented: “As to prejudgment interest, however, just compensation under both

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the 5TH Amendment to the Federal Constitution and article 1 (§7 [a]) of the State Constitution, requires not only payment of the value of the property at the time of the taking but also interest on that sum to account for the delay between the taking and the judgment” (cit. om.@ 87).

As its second **OBJECTION IN POINT OF LAW** Respondent informed the Court of the underlying appellate history of the legislative process, further advising the Court of its intention to file a writ with the Supreme Court of the United States “seeking final review of Petitioner’s condemnation proceeding”.¹

As its third **OBJECTION IN POINT OF LAW** Respondent alleges that Petitioner denied Respondent access to the subject real property. It is further alleged that it is entitled to damages from “the date of the *de facto* taking” at paragraph “30” of its Verified Answer.

For its fourth **OBJECTION IN POINT OF LAW** Respondent reserves any and all right to claim damages for fixture values.²

COMMENTARY

As Petitioner correctly states in its Memorandum of Law in support of the Petition, the cases advanced by Respondent in its Answer and Brief require an advance payment after title has vested in Condemnor. Respondent, reputed owner of the subject property, relies heavily on the case reported as **Mtr of Village of Port Chester to Acquire Title etc.**, 5 Misc.3d 1031A, 799 N.Y.S.2d 164 (Sup Ct.

¹ That Court has since denied the Writ.

² No further information is alleged or provided this Court

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Westchester Co., 2004) wherein Justice Dickerson in a well-reasoned, extensive analysis discussed the concept of advance payments in eminent domain proceedings. Justice Dickerson emphasized that Petitioner had made offers to tender payment with regard to the acquisition of the fee title, which was accepted (*supra* @2).³ Respondents there were compelled to move the Court for an order directing payment of the advance payment several months after the offer. Petitioner, the Village of Port Chester, cross-moved for a stay of the obligation to make the advance payment, pending the outcome of claimant's federal action.

The Court noted in passing that the condemnee is entitled "to receive advance payment with interest... without giving up any of their rights to seek greater compensation and challenge the condemnation proceeding in Federal Court."(*supra*@5). In reciting a portion of the legislative history (Chp. 1161, 1971) the Court (cit.om.) stated that advance payments including interest are intended to enable a property owner to replace the property of which it has been deprived. Reflecting that advance payments are remedial in nature, that Court's language referring to pre-judgment interest, refers to the final judgment fixing just compensation. As stated by Justice Dickerson, the nature of the advance payment is to alleviate the hardship imposed on a property owner deprived of the use of its property (cit. om.).

In **Mtr. of Consolidated Edison Co. of NY**, 143 A.D.2d 1012, 533 N.Y.S.2d 591 (2nd Dept., 1988), the Appellate Court concluded that "the clear language of **EDPL §301** and **§303** does not set forth an absolute requirement that just compensation be paid the property owner prior to the commencement of the

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Pagination refers to the body of the decision.

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EDPL Article 4 acquisition proceeding (sic)",(*supra* @1014).

In considering the arguments advanced by Respondent, directed at Federal constitutional questions, addressing Fifth and Fourteenth amendment jurisprudence as it applies to the taking of property, the Supreme Court of the United States has stated "Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking (cit.om.)". **Williamson County Regional Planning Commission, et al. v. Hamilton Bank of Johnson City**, 473 US 172, 194, 105, S.Ct. 3108, 3120; see also **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California**, 482 US 304, 107 S.Ct. 2378; **Asociacion de Subscpcion Conjunta del Seguro de Responsabilidad Obligatorio v. Galarza**, 484 F.3d 1.

It is apparent both from the informal argument on the return date of the Petition as well as a review of Respondent's brief in further opposition to the Petition that Respondent seeks an advance payment plus interest prior to the vesting of title. This flies in the face of legislative and case law as articulated by the Courts both at the State and Federal levels. Respondent's request for an Order dismissing the Petition for the above reasons is denied. Further, Respondent's request for the Petitioner to make an advance payment prior to title vesting is denied. In addition, Respondent's request for discovery of any disputed issue of fact under **CPLR §408**, and a Trial on disputed issues of fact is also denied. .

The Court concludes that there are no disputed issues of pre-vesting fact in this proceeding. Therefore, the Petition is in all aspects granted. Petitioner is

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directed to settle on Notice a proposed Order and Judgment.

The foregoing constitutes the Decision of the Court.

ENTER

HON. JOHN C. BIVONA, J.S.C.