

Chevere v City of New York

2009 NY Slip Op 33291(U)

April 24, 2009

Supreme Court, Richmond County

Docket Number: 102264/05

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:102264/05
Motion No.:001**

MICHAEL CHEVERE and CARMEN CHEVERE

Plaintiff

against

THE CITY OF NEW YORK

DECISION & ORDER

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of this motion for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

The defendant City of New York (“the City”) moves pursuant to *CPLR* § 3212(b) seeking an order to dismiss the plaintiff’s complaint. The City’s motion is denied in its entirety.

Facts

The plaintiffs bring this action against the City seeking to declare void the official map of the City (a street widening map), as it affects Block 5491, Lot 30 in Staten Island, New York, or in the alternative, seek compensation for the full and fair value of the property.

The plaintiffs are the owners in fee simple of a parcel of land designated on the City Tax Map as Tax Block 5491, Lots 29 and 30, otherwise known as 393 Ridgewood Avenue. Prior to the plaintiffs’ acquisition of the subject property on November 15, 1995, the City granted to the plaintiffs’ predecessors in title a deed containing the following provision:

In the event of the acquisition by the City of New York by condemnation or otherwise of any part or portion of the above premises lying within the bed of any street or avenue as said street or avenue is shown on the present City Map, the party of the second part, and the heirs or successors and assigns of the party of the second part, shall only be entitled to compensation for such acquisition to the amount of One Dollar and shall not be entitled to any compensation for any buildings or structures erected thereon within the lines of the street or avenue so laid out and acquired. This covenant shall be binding upon and run with the land and shall endure until the City Map is changed so as to eliminate from within the lines of said street or avenue any part or portion of the premise and no longer [emphasis added].

On May 28, 2002, a Consent Judgment declared void and without legal effect a Tax Map that had been adopted on August 10, 1959 affecting a parcel adjoining the plaintiffs' property at 389 Ridgewood Avenue, Block 5404, Lot 1. The plaintiffs argue that as a result of the rearrangement by the Consent Judgment an eighty foot wide street has been narrowed into a forty foot wide street, placing a cloud on the plaintiffs' property. This new burden, the plaintiffs allege, makes their property unmarketable and therefore constitutes a regulatory taking by the City.

In this motion, the City argues that it is entitled to summary judgment because even if its actions were to constitute a regulatory taking, the plaintiffs would only be entitled to compensation of One Dollar, as stipulated in the covenant. The City also contends that the mapping is not a regulatory taking because it does not deprive the plaintiffs of "all but a bare residue of the value" of the property, the standard for a regulatory taking. It points out that the subject property has been sold and mortgaged since the street mapping, unlikely making it unmarketable or valueless. In response, the plaintiffs contest that the City has failed to demonstrate a legitimate rational governmental interest, applicable whether there is a "dollar condemnation clause" or the subject property has more than a bare residue of the value.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”¹ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”² Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.³ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁴ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁵ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁶

It is well settled that to challenge a land use regulation the landowner must produce “dollars and cents” evidence as to the economic return that could have been realized but for the government’s regulation.⁷ The City points this court’s attention to plaintiff Michael Chevere’s deposition where he admitted that he had obtained title insurance when he purchased the

¹ *CPLR* § 3212[b].

² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁵ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

⁶ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

⁷ *Spears v. Berle*, 48 NY2d 254 [1979].

property.⁸ In contrast, the plaintiffs proffer the sworn affidavit of Michael Granito, a licensed real estate broker, declaring that the subject property is unmarketable. Granito avers that after he advertised Lot 30 with the *Staten Island Advance*, a prospective purchaser made an offer for \$200,000 subject to the demapping of the street and approvals to build. According to Granito, this provision of the offer makes Lot 30 virtually unmarketable.

In the instant matter the court finds that there are issues of fact surrounding the marketability of the subject property. At this juncture, and keeping in mind that a summary judgment motion must be scrutinized in the light most favorable to the non-moving party, this Court cannot dismiss the plaintiff's complaint without evaluating these issues at trial.

Accordingly, it is hereby:

ORDERED, that the defendant City of New York's motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 on June 10, 2009 at 9:30 A.M. for a Compliance Conference.

ENTER,

DATED: April 24, 2009

Joseph J. Maltese
Justice of the Supreme Court

⁸ Testimony of Michael Chevere, April 6, 2007, 20.