

Foxwood Forest Lenca, LLC v City of New York

2010 NY Slip Op 32847(U)

October 5, 2010

Supreme Court, Richmond County

Docket Number: 101121/09

Judge: Joseph J. Maltese

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

**Index No.: 101121/09
Motion No.: 003 & 004**

FOXWOOD FOREST LENCA, LLC,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

THE CITY OF NEW YORK,

Defendant

The following items were considered in the review of the following motion and cross motion for summary judgment.

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

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves for an order granting it summary judgment on the issue of whether the defendant's actions constitute a de facto taking. The defendant cross-moves for an order granting it summary judgment in its favor. The plaintiff's motion is granted and the defendant's cross-motion is denied.

Facts

The plaintiff is the record owner of a parcel of land located on Forest Hill Road on Staten Island, New York. It is designated as Block 2370 and Lot 162 on the tax map of Richmond County. While it is designated as residential land, it is currently an undeveloped lot of approximately 15,700 square feet. At some point prior to this action the plaintiff placed a

temporary construction fence set back from its property line at the edge of Forest Hill Road. The plaintiff testified that he did not place the temporary construction fence on the property line out of concern that it could be hit by passing traffic.

The plaintiff's land between its fence and Forest Hill Road consisted primarily of grass and other vegetation. On or about September 14, 2008 the defendant came on to the plaintiff's land and paved over the existing grass and other vegetation. In support of its motion for summary judgment the plaintiff annexed the affidavit of Thomas Cocola, the Borough Commissioner, for the New York City Department of Transportation ("DOT"). Commisisoner Cocola averred the following in connection with the subject property:

13. Related safety concerns sprang from the condition of the roadway edge in front of the subject property. The seam where the paved roadway met the earthen area was continuously crumbling, exacerbated by the fact that motorists naturally pull to the right on that stretch in order to avoid large vehicles approaching from the opposite direction. As a result, the right edge of the roadway presented an uneven surface. Additionally, the right edge of the road along the earthen area had to be patched so many times and in so many places that the white line marking the edge of the road was virtually obliterated.

17. In undertaking the paving, there was absolutely no intent on the part of any employee of DOT to "take" the subject portion of the property for public use. The decision to pave was a purely practical, logistical one and grew out of the safety and maintenance concerns referenced above.

The plaintiff argues that actions taken to remedy purported safety concerns by the defendant constitutes a de facto taking of its land.

Discussion

Summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.¹ It is well established that summary judgment should be granted only if there are no material and triable issues of fact. It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. Issue-finding rather than issue determination is the key to summary judgment and the affidavit should be scrutinized in the light most favorable to the party opposing the motion.²

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any triable issue of fact.³ If on any branch of a summary judgment motion, the movant fails to meet the initial burden, the burden never shifts to the opponent, and the movant's motion should be denied without regard to the sufficiency of the opposition papers.

A finding of inverse condemnation or de facto taking requires a showing that the government has intruded onto the property and interfered with the owner's property to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from the owner.⁴ Here, it is undisputed that the defendant entered onto the plaintiff's land and paved over the grass area. While it is conceded by the plaintiff that it may still develop a significant portion of the land, it cannot develop the land in question because it has been paved over by the defendant. The plaintiff argues that general public traveling on Forest Hill Road frequently drive on this paved portion of his land as if it were a part of the

¹ *Barclay v. Denckla*, 182 AD2d 658, [2d Dept 1992].

² *Hantz v. Fishman*, 155 AD2d 415, [2d Dept 1989].

³ *Dempster v. Overview Equities, Inc.*, 4 AD3d 495, [2d Dept 2004].

⁴ *O'Brien v. City of Syracuse*, 54 NY2d 353, [1981].

public roadway, and park their cars on this paved land as if it were the parking lane of a street. These facts are sufficient to meet the plaintiff's burden on summary judgment.

In opposition, the defendant cross moves for summary judgment. The defendant argues that it did not deprive the plaintiff of its use and enjoyment of its land. In particular it points out that the plaintiff can still enter and leave the property in spite of the fact that the defendant paved over the land. In addition, the defendant implies that the plaintiff had a duty to clearly mark the lot line of its property and points out that cars traveling along Forest Hill Road would sometimes cross the lot line and travel on the plaintiff's property. But this is inadequate to meet the defendant's burden on its cross motion or raise an issue of triable fact on the issue of liability.

The affidavit of Thomas Cocola, the Borough Commissioner, for the New York City Department of Transportation clearly indicates that the defendant took the plaintiff's land for safety and maintenance reasons. It is clear that the defendant purposefully came onto the plaintiff's land to remedy a perceived problem by widening Forest Hill Road. While the plaintiff continues to have the ability to develop the remainder of its lot, it may not develop the paved area without significant expenditures on its part to remove the defendant's paving. It is clear to this court that the defendant intruded onto the plaintiff's land for a public purpose which now deprives the owner of its use and value. This court will hold a further hearing on the issue of damages.

Accordingly, it is hereby:

ORDERED, that Foxwood Forest Lenca, LLC's motion for summary judgment is granted as to liability only, and the Clerk shall enter judgment accordingly; and it is further

ORDERED, that the City of New York's cross-motion for summary judgment is denied; and; it is further

ORDERED, that the parties shall return to DCM Part 3 on **Monday, November 15, 2010** at **9:30 a.m.** for a Pre-Trial conference on the issue of damages.

ENTER,

DATED: October 5, 2010

Joseph J. Maltese
Justice of the Supreme Court