

**Matter of Metropolitan Transp. Auth. (East Side
Access Project [50th St. Facility])**

2011 NY Slip Op 31904(U)

July 7, 2011

Sup Ct, NY County

Docket Number: 402155/10

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

MARTIN SHULMAN
J.S.C.

PRESENT.

PART 1

Index Number : 402155/2010
METROPOLITAN TRANSPORTAITON
vs
BLOCK 1285
Sequence Number : 001
COMPEL DISCLOSURE

INDEX NO. 402155
MOTION DATE _____
MOTION SEQ NO. 001

Answering Affidavits — Exhibits A
Replying Affidavits _____

[Note] 1
[Note] 2
[Note] 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached decision and order

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUL 7, 2011

MARTIN SHULMAN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
In the Matter of the Application of the
METROPOLITAN TRANSPORTATION
AUTHORITY, relative to acquiring title in fee
simple absolute to certain real property, required for
the

**EAST SIDE ACCESS PROJECT
(50TH STREET FACILITY)**

Index No: 402155/10

Decision and Order

**BLOCK 1285, LOT 29; BLOCK 1285, LOT 43;
BLOCK 1285, LOT 44; BLOCK 1285, LOT 45;
& BLOCK 1285, LOT 46 (FEE),**

as said property is shown on the current Tax Map of
the Borough of Manhattan, City and State of New
York.

-----X
FONTESELVA NEW YORK LIMITED, (BLOCK
1285, LOT 29)

Claimant,

FILED

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-against-

METROPOLITAN TRANSPORTATION
AUTHORITY,

Condemnor.

-----X
Hon. Martin Shulman:

On October 14, 2009, as part of the East Side Access Project to allow for easier
commuter transportation service (i.e., passengers of the Long Island Railroad *inter alia*
will have better access to the east side of Midtown Manhattan and its transportation
services), condemnor, Metropolitan Transportation Authority ("MTA"), ultimately
acquired title to 45 East 49th Street (Block 1285, Lot 29), New York, New York

(the "Property") which claimant, Fonteselva New York Limited ("Fonteselva", "former owner" or "claimant"), formerly owned.

Fonteselva now moves for discovery pursuant to CPLR §408 and, particularly, to obtain an order directing MTA to respond to claimant's First Request for the Production of Documents (Exhibit A to Motion) and to its First Set of Interrogatories (Exhibit B to Motion), both dated March 28, 2011. The former owner claims this discovery is needed to learn if MTA intentionally delayed starting this condemnation proceeding for 2½ years, which claimant perceives to be a value-depressing act to allegedly benefit from the "Great Recession" and pay Fonteselva markedly reduced or unjust compensation for the Property. In other words, claimant believes MTA took "advantage of a severely declining market to the detriment of the condemnee." (Greilsheimer Aff in Support of Motion at ¶ 12).

In opposition, MTA *inter alia* contends that: (1) there was no delay, intentional or otherwise, when this condemnor initiated this eminent domain/condemnation proceeding well within the three year period prescribed by EDPL §401(A)(1)(this relevant time period runs from the publication date of the condemnor's "determination and findings pursuant to [EDPL section 204] . . ." with a ten year limit for public projects planned in stages); (2) claimant fails to show any evidence of any affirmative act(s) the MTA did to "blight" the property and decrease its value (*see City of Buffalo v J. R. Clement Co., Inc.*, 20 NY2d 241 [1971]); (3) "any decline in value was attributable not to the threat of condemnation but to the global recession . . ." (Webb Opp Aff at ¶ 11); and (4) indisputably, MTA's acquisition of the Property is not time-barred, nonetheless, if the initiation of this condemnation proceeding was arguably constrained, it was due to

needed resolution of a federal environmental lawsuit and environmental reviews and approvals (*Id.* at ¶ 12).

In its reply, as supplemented, claimant's counsel argues that: the statutory three year period to commence a condemnation proceeding is not related to valuation of the Property, but must be complied with to avoid a "do over" penalty of notice, hearings, etc. (see EDPL § 401[B]); MTA's inaction in starting this proceeding within a reasonable period of time after its May 2007 EDPL Article 2 Determination and Findings (Exhibit E to Motion), especially when it was "aware of the greatest economic downturn in 80 years. . ." (Greilsheimer Reply Aff at ¶ 7), should be viewed as an affirmative value-depressing act; and MTA cannot possibly claim the 2½ year delay in starting this proceeding is attributable to federal environmental reviews and approvals as well as a federal environmental lawsuit (docketing information of which claimant alleges was belatedly turned over to its counsel), because the latter was "closed on November 30, 2006, nearly six months before MTA issued its Determination and Findings . . ." (Greilsheimer Supp Aff at ¶ 7 and Exhibit C attached thereto). Hence, Fonteselva insists on obtaining this needed discovery to learn the "why's" of MTA's 2½ year inaction in the face of the Great Recession of the 21st Century that diminished the Property's value.

Discussion

"[A] condemnation proceeding . . . [is] a 'special proceeding' . . . that had been specially created by the Legislature for the condemnation of real property . . ." (*Central Hudson Gas & Elec. Corp. v Newman*, 35 AD2d 989, 990 [2nd Dept 1970]), and "in a

proceeding such as this, . . . disclosure is available only by leave of the court (see CPLR 408) . . ." (*City of Glen Cove Indus. Dev. Agency v Doxey*, 79 AD3d 1038 [2nd Dept 2010]). Supreme Court has considerable discretion to grant or deny this relief (*L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 136 [1st Dept 2009]; see also, *Grossman v McMahon*, 261 AD2d 54, 57 [3rd Dept 1999]).

Without question, MTA commenced this condemnation proceeding within three years after publishing its Determination and Findings (the latter required pursuant to EDPL § 204) and was fully compliant with EDPL § 401. While this statute does not directly address the issue of property valuation for purposes of just compensation, it advances a more important goal, namely, "to assure that development is preceded at appropriate intervals by an environmental review process involving the affected community . . ." *250 West 41st Street Realty Corp. v New York State Urban Dev. Corp.*, 277 AD2d 47, 48 (1st Dept 2000).

Putting aside the issue of whether the federal environmental lawsuit and the needed resolution of environmental reviews and approvals actually caused the 2½ year delay in initiating this special proceeding, claimant offers no legal support for the proposition that a public authority such as MTA must initiate a condemnation proceeding immediately or as soon as practicable after the publication of its EDPL Article 2 Determination and Findings. Contrarily, EDPL § 401(A)(1) expressly allows the MTA to take "*up to three years after the conclusion of . . . publication if its determination and findings pursuant to section two hundred and four*¹ . . ." (emphasis added) to

¹ After conducting the appropriate public hearings regarding the then proposed East Side Access Project, MTA was statutorily required to publish its determination and findings

commence an acquisition proceeding under EDPL Article 4.

Moreover, the former owner cannot point to a single affirmative value-depressing act MTA committed to adversely affect the value of the Property. Fonteselva characterizes MTA's inaction during the ensuing 2½ year period after its publication of its Determination and Findings as an affirmative act that in effect allowed the economic downturn to "blight" the Property. While this charge attributing this inaction as an intentional act designed take advantage of claimant is creative, nonetheless, it rests on sheer surmise and speculation.

And claimant's proffer of selected portions of a November 19, 2010 appraisal report (Exhibit C to Motion) about the grim economic realities of New York's real estate market place and its effect on claimant's Property to render MTA blame-worthy simply does not cut it. Claimant cannot possibly blame MTA for the "Great Recession." Nor can the former owner turn to any legal authority which requires a public authority seeking to condemn real property for a public project to take "administrative" notice of the economy to accelerate or delay the condemnation process.

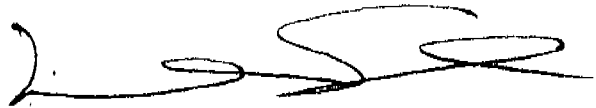
Notably, in the face of a 2008 global financial crisis, a new president was overwhelmingly elected who campaigned on a platform of hope and change. And everyone had the audacity to hope this new president and the Congress would implement domestic policies to turn this recession around. Unfortunately, under these circumstances and in life, timing is everything. MTA simply cannot be faulted for complying with proper procedure regardless of the fact that the valuation of the Property

which *inter alia* had to specify: "the public use, benefit or purpose to be served by the proposed public project . . ." (EDPL § 204[B][1]).

was adversely affected by economic circumstances beyond MTA's control. More to the point, the discovery claimants seek is really a fishing expedition to hopefully catch something that would demonstrate that MTA was/is a lead character in Fonteselva's grim tale of economic woe. This is simply not happening. In accordance with this court's discretion, it is hereby ordered that this motion for leave to conduct discovery is denied.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been mailed to counsel for the parties.

Dated: New York New York
July 7, 2011



HON. MARTIN SHULMAN, J.S.C.

FILED

JUL 12 2011

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