

Saratoga County Water Auth. v 708 Rte. 9 LLC

2012 NY Slip Op 33914(U)

October 11, 2012

Supreme Court, Saratoga County

Docket Number: 2008-1074

Judge: Thomas D. Nolan, Jr.

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

SARATOGA COUNTY WATER AUTHORITY,
Plaintiff,

-against-

Proceeding No. 1

708 ROUTE 9 LLC, et al,
Defendant.

DECISION AND ORDER
RJI No. 45-1-2008-0399
Index No. 2008-1074

BRIAN DWYER, WALTER KLIKOCKI, EUGENIA KLIKOCKI,
CAROL ALLEN, JAYMES ALLEN, JAMES WHITMORE,
THERESA WHITMORE, MICHAEL WORTH, DEBORAH WORTH
and ZETTERSTROM FAMILY TRUST,
Claimants,

-against-

Proceeding No. 2

SARATOGA COUNTY WATER AUTHORITY,
Defendant.

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

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FILED

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

APPEARANCES: HACKER MURPHY, LLP
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Latham, New York 12110

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On July 31, 2008, the Saratoga County Water Authority (Authority) acquired temporary and permanent easements by eminent domain on numerous parcels in connection with the installation of a water transmission line running from its water treatment plant in the Town of Moreau to the Town of Malta. Several property owners, claimants in Action No. 2, accepted advance payments offered pursuant to EDPL 304, and thereafter filed claims seeking additional compensation.

In Action No. 2,¹ a scheduling order signed by the court on May 18, 2009 required that the Authority and claimants file appraisals with the Clerk by October 5, 2009. The Authority did so. Claimants did not and have not requested an extension. Subsequently and for reasons not explained in the papers filed on this motion, the Clerk sent the Authority's appraisals to claimants' counsel. As now relevant, the appraisals for six sets of claimants, other than Brian Dwyer (Dwyer), fixed damages in amounts less than the advance payments. In Dwyer's case, the appraisal set his damages at \$23,500.00, well in excess of the \$1,690.00 advance payment he received.² His counsel now demands payment of that amount with interest of 9% from the taking date less the advance payment made.

Two motions are now pending.

The Authority moves for an order dismissing all claims based on claimants' failure to file appraisals or an order precluding claimants and, in particular Dwyer, from using at trial the Authority's appraisals or in the alternative, requiring all claimants, except Dwyer, to return the portions of advance payments made to them in excess of what the Authority's filed appraisals

¹The now pending motions concern Action No. 2 only.

²Dwyer was paid \$1,771.06 (\$1,690.00 plus interest of \$81.06) on November 3, 2008.

found their damages to be.

Claimants oppose.

First, the motion to require that all claimants, save Dwyer, return advance payments made to them in excess of what the filed appraisals determined that loss to be is denied, without costs. As an initial matter, the Authority does not include in their motion evidence establishing what advance payments had been made to the claimants other than to Dwyer or the appraisals themselves to demonstrate damages in an amount less than what had been paid. Notably, the Authority's standard stipulation and release (see Exhibit 5, Notice of Cross Motion) contains no provision permitting such a "take-back". Presumably, the offers originally extended were based upon values from appraisals commissioned by the Authority. More importantly, the court has found no precedent and the Authority submits no precedent for the relief it seeks.

Next, although claimant Dwyer concedes that by virtue of Uniform Rule 202.61 (e) entitled "Exchange of Appraisal Reports in Eminent Domain Proceeding" (22 NYCRR § 202.61), he is precluded from offering at trial appraisal testimony on value from his own expert, he urges that "preclusion of an appraisal does not foreclose litigation of the valuation issue". El Sawah v Empire State Pipeline, 219 AD2d 839 (4th Dept 1995); accord Dufel v State of New York, 181 AD2d 792 (3rd Dept 1992).

Here, if not for the release of the Authority's appraisals to Dwyer's counsel, the favorable valuation would not have been revealed until Dwyer had filed his appraisal. Nonetheless, there is no indication that claimant played any role in the clerk's inadvertent release of the appraisal. Thus, there is no reason to sanction Dwyer by now precluding the potential use of that information at trial. How claimant proposes to get the Authority's appraisal into evidence


remains an open question for now and one which the court cannot decide until a proffer is made.

The Authority's motion to dismiss Dwyer's claim is denied and Dwyer's cross motion for an order directing the Authority tender to him an advance payment consistent with that appraisal is also denied, both without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for the Authority. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for the Authority is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

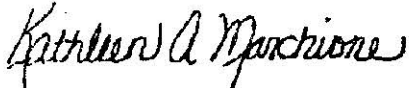
DATED: October 11, 2012
Saratoga Springs, New York



HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED

Kathleen A. Marchione



Saratoga County Clerk

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ENTERED