

Lehn Co. v State of New York
2013 NY Slip Op 33962(U)
November 14, 2013
Court of Claims
Docket Number: 118095
Judge: Gina M. Lopez-Summa
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STATE OF NEW YORK COURT OF CLAIMS

LEHN COMPANY,

Claimant,

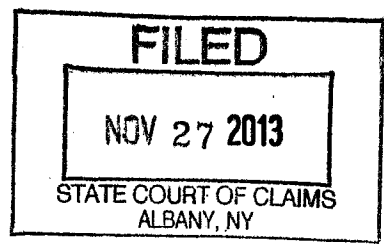
DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

**Claim No. 118095
Motion No. M-83742**

Defendant.



BEFORE:

**HON. GINA M. LOPEZ-SUMMA
Judge of the Court of Claims**

APPEARANCES:

**For Claimant:
Flower, Medalie & Markowitz
By: Edward Flower, Esq.**

**For Defendant:
Hon. Eric T. Schneiderman, Attorney General
By: Rose Farrell Lowe, Assistant Attorney General, of
counsel**

The following papers were read and considered by the Court on this motion: Claimant's Notice of Motion, Attached Affidavits, Attorney's Affirmation with annexed Exhibits A-E, Defendant's Affirmation in Opposition and Claimant's Reply Affirmation.

Claimant, Lehn Company, has brought this motion pursuant to Eminent Domain Procedure Law (EDPL) § 701 for an Order granting it an additional allowance in the sum of \$135,052.00 for actual and necessary costs, disbursements and expenses, consisting of reasonable attorneys' fees, expert witness fees and disbursements actually incurred by claimant in

prosecuting the underlying appropriation action. Defendant, the State of New York, objects to portions of claimant's motion.

On May 8, 2013, this Court issued a Decision awarding claimant a total of \$257,500.00 in damages with interest as stated therein for the partial appropriation of property, as well as a temporary easement on the property, owned by claimant.

Claimant brought this motion pursuant to EDPL § 701 for an additional allowance of \$109,470.00 for attorney's fees; \$18,000.00 for appraiser's fees; \$7,532.00 for engineer's fees; and for the \$50 filing fee.

EDPL § 701 provides :

“In instances where the order or award is substantially in excess of the amount of the condemnor's proof and where deemed necessary by the court for the condemnee to achieve just and adequate compensation, the court, upon application, notice and an opportunity for hearing, may in its discretion, award to the condemnee an additional amount, separately computed and stated, for actual and necessary costs, disbursements and expenses, including reasonable attorney, appraiser and engineer fees actually incurred by such condemnee. The application shall include affidavits of the condemnee and all parties that have incurred expenses on the condemnee's behalf, setting forth inter alia the amount of the expenses incurred.”

The underlying policy of the statute is to provide “fairness to a private property owner forced to litigate the value of its property when the State comes forward with an unreasonably low offer in effecting a taking of that property” (*General Crushed Stone Co. v State of New York*, 93 NY2d 23, 25 [1999]). “The statute requires two determinations: first, whether the award is ‘substantially in excess of the amount of the condemnor's proof’ and second, whether the court deems the award necessary ‘for the condemnee to achieve just and adequate compensation.’”

Where both tests are satisfied, the court *may* award reasonable fees” (*Hakes v State of New York*, 81 NY2d 392, 397 [1993]). It is well settled that the first prong of the test refers to a comparison by the Court of the initial offer made by the condemnor and the ultimate amount awarded (*CMRC, Ltd. v State of New York*, 16 AD3d 204 [1st Dept 2005]; *Madowitz v State of New York*, 288 AD2d 443 [2d Dept 2001]); *Matter of Village of Johnson City [Waldo’s, Inc.]*, 277 AD2d 773 [3d Dept 2000]). More than a modest increase in value is required to satisfy the first requirement of the statute (*Matter of County of Tompkins*, 298 AD2d 825 [3d Dept 2002]).

Defendant made an original offer of payment in this matter of \$35,600.00. The Court finds that the ultimate award of \$257,500.00, which is over 700% more than the initial offer, substantially exceeds defendant’s initial offer (*Madowitz v State of New York*, 288 AD2d 443 [2d Dept 2001]).

The Court must now determine whether the expenses incurred by claimant were necessary to achieve just and adequate compensation. Claimant is seeking \$109,470.00 for attorney’s fees. Claimant has submitted a contingency retainer agreement in support of its claim for attorney’s fees.¹ The retainer provides that counsel shall be entitled to thirty-three and one-third (33-1/3%) percent of all amounts above the advance payment tendered by the condemnor including interest on the excess amount. Contingency fee arrangements are an acceptable factor to be considered by the courts in determining reasonable counsel fees (*Matter of Hoffman v Town of Malta*, 189 AD2d 968 [3d Dept 1993]). Interest attributable to the advance payment should not be included when calculating the attorney’s fees (see Court of Claims Act § 20[9]). Payment

¹ Claimant supplemented his motion by filing a copy of the retainer agreement in this matter by fax on November 14, 2013.

pursuant to the judgment has not yet been made in this matter, however, the parties have agreed to use December 29, 2013 as the expected date of payment. The Court finds that the fee charged by claimant's attorney is reasonable and was incurred to achieve just and adequate compensation. Consequently, the Court will award the amount of \$109,470.00 as appropriate attorney fees in this matter.

Claimant is also seeking \$18,000.00 for appraiser's fees. Claimant's expert was retained pursuant to a retainer agreement letter dated August 19, 2010 which provided for an appraisal report fee of \$5,000.00 as well as additional monies for services over and above the initial retainer such as court testimony, \$3,500.00 per daily appearance, and preparation, \$300 per hour². Claimant has submitted a partially paid bill (CI Exh E) as well as the appraiser's affidavit which details the appraiser's work associated with the underlying action. Defendant acknowledges that claimant's appraiser is an expert in his field and that the initial fee of \$5,000 is not in excess of the usual and customary fees for the same type of work. Thus, the Court finds \$18,000.00 to be an appropriate award to claimant for expert appraisal costs in this matter.

Additionally, claimant is requesting \$7,532.00 for engineer's fees. Defendant again acknowledges that claimant's engineer is an expert in his field. Defendant also concedes that the fees of \$2,800 and \$1,350 are not in excess of the usual and customary fees for the same type of work. Claimant has submitted the engineer's affidavit which details the engineer's work associated with the underlying action. Thus, the Court finds \$7,532.00 to be an appropriate award

² Claimant supplemented his motion by filing a copy of the retainer agreement letter in this matter by fax on November 15, 2013.

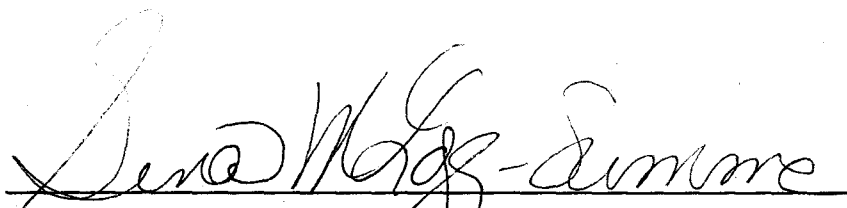
to claimant for its expert engineer costs in this matter (*see Matter of Village of Johnson City [Waldo's, Inc.]*, 277 AD2d 773 [3d Dept 2000]).

Claimant is not entitled to an additional award for the filing fee since it was previously recovered by claimant as part of the original judgment entered in this matter.

Therefore, based on the foregoing, claimant's motion is granted to the extent stated herein. Claimant is awarded the total sum of \$135,002.00 (\$109,470.00 for attorney's fees; \$18,000.00 for expert appraisal costs; and \$7,532.00 for expert engineer costs). This judgment shall be without interest, costs or disbursements (see CPLR 5001[a]; *Long Island Pine Barrens Water Corp. v State of New York*, 144 Misc 2d 665 [Ct Cl 1989]).

The Chief Clerk of the Court is hereby directed to enter said Judgment accordingly.

New York, New York
November 14, 2013



GINA M. LOPEZ-SUMMA
Judge of the Court of Claims