Tanglewood Commons, LLC v State of New York
2013 NY Slip Op 33964(U)
November 21, 2013
Court of Claims
Docket Number: 118108
Judge: Stephen J. Lynch
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

STATE OF NEW YORK COURT OF CLAIMS

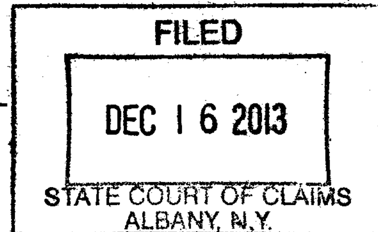
TANGLEWOOD COMMONS, LLC,

Claimant, **DECISION**

-v-

THE STATE OF NEW YORK, **Claim No. 118108**

Defendant.



BEFORE: **HON. STEPHEN J. LYNCH**
Judge of the Court of Claims

APPEARANCES:

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

For Defendant:
Hon. Eric T. Schneiderman, NYS Attorney General
By: Rose Lowe, Assistant Attorney General

This is a timely filed claim for damages caused by the permanent partial and temporary easement appropriation of claimant's property pursuant to section 30 of the Highway Law and the Eminent Domain Procedure Law (EDPL) of the State of New York in a project entitled "Port Jefferson-Coram SH 912, P.I.N. 0016.21, Suffolk County, Map No. 302, Parcel No. 303 and Map No. 419, Parcel No. 429" filed in the Suffolk County Clerk's Office on August 29, 2008, which the Court finds to be the date of the taking. Said maps and the property descriptions set forth therein are adopted by the Court and incorporated herein by reference. This claim was filed with the Clerk of the Court on March 5, 2010 and it has not been assigned or submitted to any other Court, tribunal or officer for audit or determination.

The subject property is located at the northwest corner of New York State Route 112 and Pine Road at Coram, Township of Brookhaven, Suffolk County, New York. Ownership was not contested and both parties' appraisers valued the property on the basis of claimant's ownership of a fee interest in the subject premises. Thus, the Court concludes that the claimant has established title to and was the owner of the property at the time of the appropriation.

A trial was held on the limited issue of whether claimant sustained severance damages and, if yes, the extent or amount of such damages. As detailed herein, the parties had settled upon the appropriate level of compensation to the claimant for the 10 foot strip of claimant's property which was appropriated by the defendant in 2008 pursuant to New York Highway Law § 30 and New York Eminent Domain Procedure Law. The parties waived a viewing of the property by the Court pursuant to § 510 of the Eminent Domain Procedure Law[1]. The trial was necessitated by the fact that the parties could not agree whether the taking of that 10 foot strip resulted in indirect or consequential damages, referred to alternatively as "severance" damages *(see, Manlius Ctr. Rd. Corp. v State of New York,* 49 AD2d 685 [4th Dept 1975]), to the remainder of claimant's land. Essentially, the claimant contends that the taking of the 10 foot strip (on the eastern boundary of the property, along State road Route 112, in connection with the widening and reconstruction of Route 112) caused severance damages consisting of two components, specifically (1) loss of yield in the development

---

[1] Where, as here, the parties have no dispute as to the value of property actually appropriated and have, in fact, stipulated in writing as to the value to be used in calculating direct damages (they agreed to use the greater per acre value as determined by the defendant State of New York's expert appraiser, to wit, $650,000.00 per acre) as well as the value of the temporary easement herein, the Court determines that the provisions of the Court of Claims Act § 12 (4) and Eminent Domain Procedure Law § 510 (a) relating to a viewing by the Court of the property appropriated do not pertain. It is noted that at no time in the course of the several conferences on this case or upon the trial was it suggested by counsel that there would be any need for a viewing of the appropriated property (see EDPL § 510 [a]) as the value of the appropriated property was not a matter remaining in dispute.

of the remainder of the property and (2) limited access to the remainder property along the Route 112 border thereof.

The parties' attorneys entered a detailed stipulation of facts pertaining to this action and for the purpose, inter alia, of delimiting the proof to be presented at the trial of the remaining issues (the stipulation is set forth at length herein). With many pertinent facts relating to the history of the property having been agreed to, the Court's function in this case was to hear the testimony of the parties' experts, who each prepared reports for this case, and to consider the proof adduced through their testimony, as well as documentary proof submitted on consent of counsel[2], in determining such remaining issues.

THE STIPULATION

On February 13, 2013, the parties, by counsel, agreed upon the following facts forming the factual setting for the trial of the issues identified in the third paragraph of this decision. The written stipulation, signed by the respective attorneys and received in evidence on consent as Court Exhibit "1", states, in full, as follows:

> "The parties stipulate as follows:
>
> 1. Title vested in the State of New York to a portion of the property owned by claimant and appropriated by the State on August 29, 2008.
>
> 2. That prior to the State's appropriation the subject property consisted of 13.907 acres (605,779 square feet) of residentially zoned vacant land but which possessed a highest and best use for change of zone from A residence to J2 business and that on the title vesting date there existed a reasonable probability the subject property would be

[2] Trial Transcript at page 7.

rezoned to a J2 classification pursuant to the zoning ordinance of the Town of Brookhaven.

3. That a portion of the subject property was appropriated in connection with a New York State Department of Transportation project for the improvement of Route 112 between Old Town Road and New York Route 347 and that maps or surveys indicating the possibility of an appropriation of an interest in the subject property existed as early as the calender year 2003 and were available to inspection by property owners by November 9, 2004.

4. That a public hearing in connection with the project for which a portion of the subject property was appropriated was held by the defendant on Tuesday, November 9, 2004 at the Ward Melville High School cafeteria on Old Town Road in East Setauket and that notice of such hearing was previously published in Suffolk Life and Newsday.

5. That the New York State Department of Transportation acquisition map for the fee acquisition of the subject property and described in the area actually appropriated in fee from the subject property was certified property necessary for the project for which the subject property was ultimately appropriated and acquisition thereof was recommended by the State's regional design engineer on August 16, 2005.

6. That on the title vesting date of August 29, 2008, there existed a reasonable probability that the subject property would be rezoned to a J2 classification pursuant to the zoning ordinance of the Town of Brookhaven.

7. That on the title vesting date of August 29, 2008 the highest and best use of the subject property was to be rezoned to a J2 category pursuant to the zoning ordinance of the Town of Brookhaven and to become the site of a commercial development.

8. The claimant's appraiser has valued the subject property before the appropriation of any portion thereof by the State and absent consideration of the pendency of said appropriation at the rate of $550,000.00 per acre (or approximately $12.626 per square foot) and defendant's appraiser has appraised the subject property at $650,000.00 per acre (approximately $14.922 per square foot). Without either claimant or defendant conceding the correctness of the opinion of either appraiser on this point but for purposes of establishing the direct damages (exclusive of any indirect, severance or consequential damage which the Court may or may not find) the parties adopt a valuation of $650,000.00 per acre and an award for direct damages of $14.922 per square foot for each square foot which the Court shall have found has been appropriated in fee.

[* 5]

> 9. The parties agree that the defendant has appropriated a temporary easement over 10,072 square feet of the subject property which temporary easement runs from the title vesting date of August 29, 2008 until the filing by the defendant of a notice of termination thereof on October 6, 2011.
>
> 10. The parties agree that the damages to which claimant shall be entitled for said temporary easement shall be the sum of $1,503.00 per month for a total of $56,011.80.
>
> 11. That on the date title vested in the State of New York to the portion of the subject property appropriated said property was owned by claimant, Tanglewood Commons, LLC, and the advance payment required pursuant to the Eminent Domain Procedure Law was made by the defendant to the claimant.
>
> 12. That the claimant, Tanglewood Commons, LLC, is entitled to any further award made by the Court in this matter."

OTHER PROOF

Although at the time the subject 10 foot strip of property was acquired by the State (on August 29, 2008) the parcel was vacant and no approved zoning change had been received from the Town of Brookhaven, the approval was eventually received for an up-zoning to "J2" (business) zoning on January 25, 2011. The proof adduced through the parties' respective experts focused on the details of the proposed commercial development upon the remainder property which will accommodate five buildings including a "CVS" pharmacy once it is fully developed.

Claimant's expert Michael Russo, associate senior project manager at Hawkins, Webb and Jaeger, an architectural engineering firm, testified based upon his study and site plan report (claimant's Exhibit "1") relating to the subject property. He stated that the taking would result in consequential or "severance" damages to the remainder and that, although the taking involved only 1.6 percent of the overall acreage of the almost 14 acre (specifically, 13.907 acres) of vacant land, claimant's ability to utilize the remainder was actually impacted by a decrease in yield

disproportionate - greater than - the percentage of the property taken by the defendant. Russo opined that the taking resulted in a loss of yield - in terms of commercial square footage - to an extent of six percent of what the claimant would have had without (in the absence of) the taking of the 10 foot strip along Route 112.

Claimant's real estate expert Elinor Brunswick testified based on her reports prepared in this action (claimant's Exhibits "2" and "3"). She opined that the taking in this case occasioned a consequential loss in value of six percent. This was based on her calculation of value of the property before the taking as $7,650,000.00 (at $550,000.00 per acre) and her finding that there would be a reduction in the ability to develop the property commercially (from 58,030 square feet to 54,585 square feet). Therefore, according to Brunswick as well as the claimant's engineer Russo, the consequence of the State taking 1.6 percent of the claimant's land was a six percent loss to the remaining land in terms of the commercial yield able to be achieved. Brunswick's calculation for this component of severance damages was $326,690.00 (claimant's Exhibit "2" at page 53). Brunswick also opined that in her view there was a second component to claimant's consequential/severance damages, specifically, that along the parcel's over 900 foot eastern border along Route 112, there would be only one point for ingress and egress to the remainder property; this component was the subject of Brunswick's supplemental appraisal in evidence (claimant's Exhibit "3"). Brunswick's calculation relating to this component of alleged severance damages is $1,000,000.00 (a sum reflected in claimant's Exhibit "3" in evidence).

The defendant presented testimony from licensed civil engineer Bruce Savik of Savik and Murray. Mr. Savik testified concerning reports he made in the context of this case based on his review of documentary proof ("all the pertinent items", trial transcript at page 111) including the

Court file for this case, the zoning files of the Town of Brookhaven and construction plans by the New York State Department of Transportation for Route 112. Although this witness referenced his reports which were in evidence (defendant's Exhibits "A1", "B1" and "B2") and various criteria he had considered or noted therein, upon his direct examination at trial he did not expressly address the issue of the claimant's alleged consequential (severance) damages and he did not dispute that the yield loss component as to the remainder property was six percent. On cross-examination, Mr. Savik acknowledged he had not been involved in any other Brookhaven Town zoning change development cases such as that involved herein and that he has no experience with the Town Board or Planning Board of Brookhaven on obtaining J2 zoning. He also acknowledged that he had not opined as to the greatest yield that could be obtained from the subject property before the taking in 2008 or the greatest yield that could be obtained after the taking.

Defendant presented the testimony of the certified real estate appraiser Lawrence Indimine. Mr. Indimine testified based on his reports prepared for this case which were in evidence (defendant's Exhibit "A" and "B"). Referring to his study and reports in this case, he stated that the purpose of his appraisal was "to determine the damages sustained by the subject property as a result of the partial acquisition of land in fee as well as the imposition of a temporary easement" (trial transcript at page 147). He stated that his appraisal approach was a sales comparison approach and he discussed the properties he described as "reasonably comparable" to the subject property which were used as a basis for such analysis. Mr. Indimine stated that his before taking evaluation of the property was $650,000.00 per acre - for a total value of $9,040,000.00. When then asked by defendant's counsel "[a]nd in coming to your evaluation in the after situation, did you find any consequential or severance damages?", Mr. Indimine answered "[n]o, I did not . . . I did not feel that

there was any reason to show severance damages to the subject property . . ." (trial transcript at page 150).

LAW

The "just compensation" to which the claimant is entitled for the property taken is comprised not only of direct damages (not at issue upon this trial) but also the consequential damages occasioned by the taking, sometimes referred to as severance damages (*see Gyrodyne Co. of Am., Inc. v State of New York*, 89 AD3d 988 [2011] *lv denied* 19 NY3d 804 [2012]; *Diocese of Buffalo v State of New York*, 24 NY2d 320 [1969]; *South Buffalo Ry. Co. v Kirkover*, 176 NY 301 [1903]; *Manlius Ctr. Rd. Corp. v State of New York*, 49 AD2d 685 [4th Dept 1975]; *Coldiron Fuel Ctr., Ltd. v State of New York*, 8 AD3d 779 [3d Dept 2004]; *Keinz v State of New York*, 2 AD2d 415 [4th Dept 1956] *lv denied* 3 AD2d 815 [4th Dept 1957].

DISCUSSION

The question to be resolved herein is whether and to what extent claimant sustained severance damages and requires this Court to assess the respective expert proof presented by the parties. Having done so, the Court finds that it must credit the opinion of the claimant's project manager and real estate expert concerning the loss of yield component of severance damages. Specifically, the Court finds upon consideration of all the proof before it that claimant has established by a preponderance of the credible evidence that severance damages were occasioned to the remaining property by reason of the August 29, 2008 taking of the 10 foot strip acquired by the defendant - to the extent that the yield of potential square footage for commercial development

was decreased and that this decrease was shown to result in a severance loss to claimant in the amount of $386,035.00[3] (*compare Broadway Assoc. v State of New York*, 18 AD3d 687 [2d Dept 2005]). It has not been established, however, that the additional component of severance damages sought by claimant - based on access (ingress/egress) to the remainder of claimant's property - was occasioned by the State's taking of the 10 foot strip. Stated differently, although testimony was given by claimant's experts on this component of claimed severance damages, it was insufficient and unpersuasive in this Court's view to sustain this separate component. The Court finds that the evidence does not support an award of severance damages as to this separate component thereof, which component is predicated upon there being a single means of ingress and egress from Route 112 after the taking. It so finds because it was not shown to this Court's satisfaction that, before the taking, there would have been greater ingress and egress from Route 112; therefore, it was not demonstrated that "just compensation" to claimant requires an award for severance damages based upon ingress and egress to the remainder property (*see Bopp v State of New York*, 19 NY2d 368 [1967]; *Roskopf v State of New York*, 24 Misc 3d 1225 (A) [Ct Cl 2009]; *cf. Pollak v State of New York*, 41 NY2d 909 [1977]).

Based upon the foregoing, the Court awards claimant the amount of $386,035.00 as and for consequential (severance) damages and denies the claimant's request for other severance damages.

---

[3] The figure of $386,035.00 is based upon the fact that, although in making her calculation of this component of severance damage claimant's expert Brunswick used a per acre value of $550,000.00, the parties have stipulated that the defendant's expert calculated the per acre value of the land as $650,000.00. When the yield loss (severance damages) calculated by the claimant's expert, $326,690.00 (claimant's Exhibit "2" at page 53), is recalculated at the greater per acre value - $650,000.00 - found by defendant's expert, Indimine, the quotient is $386,035.00 ($326,690.00/$550,000.00 = X/$650,000.00; X = $386,035.00).

In accordance with the parties' stipulation dated February 13, 2013, the Court also awards the sum of $56,011.80 for the temporary easement acquired by defendant for the period of August 29, 2008 to October 6, 2011 and direct damages for the fee acquisition of 10,014 square feet[4] of claimant's property in the amount of $149,428.00.

Therefore, the total award, $591,474.80, is calculated as follows:

	Amount		Description
	$ 386,035.00	-	amount of severance damages
	$ 56,011.80	-	temporary easement
+	$ 149,428.00	-	direct damages
	$ 591,474.80	-	total

Claimant is awarded $ 591,474.80 with appropriate interest from August 29, 2008 (date of taking) to the date of this decision and thereafter to the date of entry of judgment hereon pursuant to CPLR 5001 and CPLR 5002; EDPL § 514.

The award to the claimant herein is exclusive of the claims, if any, of persons other than owners of the appropriated properties, their tenants, mortgagees or lienors having any right or interest in any stream, lake, drainage, irrigation ditch or channel, street, road, highway or public or private right of way or the bed thereof within the limits of the appropriated properties or contiguous thereto; and is exclusive also of claims, if any, for the value of or damage to easements or appurtenant

[4] In this case there is no substantial dispute concerning the actual extent, in square footage, of the State's property acquisition. Although the claimant's real estate expert states that the property acquired compromises precisely 9,771 square feet of land (see Claimant's Exhibits 2 and 3) and the defendant's real estate expert states that the property acquired is 10,014 square feet (see Defendant's Exhibits "A", "A1" and "B2"), upon its review of the acquisition maps (map # 302 and 419) the Court finds that the amount of property acquired is 10,014 square feet (as asserted by defendant's expert Indimine) based upon the inscription on page 4 of the acquisition Map # 302, specifically, the reference therein to "Total Area 930.3 ± m²." This reference is to area in square meters; when a simple conversion is applied, the result is 10,014 square feet.

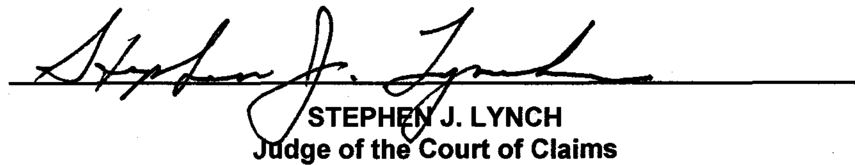
facilities for the construction, operation or maintenance of publicly own or public service electric, telephone, telegraph, pipe, water, sewer or railroad lines.

Any outstanding motions by either party at or before trial are denied.

To the extent claimant has paid a filing fee, it may be recovered pursuant to Court of Claims Act § 11-a (2).

Let judgment be entered accordingly.

Hauppauge, New York
November 21, 2013



STEPHEN J. LYNCH
Judge of the Court of Claims