2010-018177
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At an IAS Term, Part 74 of the Supreme Court of the state of New York, held for the County of Richmond, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21 day of April, 2015.

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In the Matter of THE CITY OF NEW YORK relative to acquiring title in fee simple where not heretofore acquired, for the same purpose for

SOUTH RICHMOND BLUEBELT, PHASE 3

Located in the Bluebelt areas known as Jack's Pond And Wolf s Pond, in Community District 3, South Richmond, in the Borough of Staten Island, County of Richmond, City and State of New York.

Index No. 4024/10

DECISION and ORDER

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594 ASSOCIATES INC. (Damage Parcel 2)
(Block 6550, Lot 71)

Claimant,

-against-

THE CITY OF NEW YORK

Condemnor.

- X

Condemnor CITY OF NEW YORK having moved to strike Claimant's appraisal, and the motion having come before the Court on, March 26, 2015, and upon reading the Notice of Motion, dated February 17, 2015, the Affirmation of Michael Chestnov, Esq., dated February 17, 2015, and the exhibits annexed thereto; the Affirmation in Opposition of Michael Rikon Esq., attorney for Claimant, dated March 5, 2015; the Reply Affirmation of Michael Chestnov Esq., dated March 24, 2015; the Brief of Claimant dated March 30, 2015 and exhibit annexed thereto; the sur-reply of Michael Chestnov, Esq., dated April 9, 2015 and after argument of counsel and due deliberation thereon, the Condemnor's motion is granted for the reasons set forth below.

The underlying proceeding involves the condemnation of a wetlands property on Staten Island by THE CITY OF NEW YORK as part of its Bluebelt project. THE CITY vested title in the property on October 26, 2010. The Claimant owner of the property filed a fee claim on November 15, 2010. Appraisal reports were exchanged by the Condemnor and Claimant on October 22, 2013.

Claimant alleges that on or around September 26, 2005, prior to vesting, the CITY installed a headwall, and an overflow outlet for storm water on Claimant's property without permission or license. Claimant alleges that headwall and outlet discharged water onto Claimant's property. Claimant further alleges that the headwall and outlet are not visible from the road but are only visible from within the property.

Claimant's appraisal valued the property as of September 26, 2005, rather than October 26, 2010, the date of vesting. Claimant's counsel instructed its appraiser to use the date the CITY is alleged to have constructed the headwall and outlet because he believed that the headwall and outlet constituted a defacto taking as of the date of its construction.

The CITY now moves to strike the appraisal on the grounds that it is improper and of no probative value, because it does not value the property as of the vesting date. The CITY argues that any claim of defacto taking is barred by the three year statute of limitations applicable to property damage.

Claimant argues that there is no statute of limitation applicable to a defacto taking claim, that and even if there were, it would run from the time the construction was discovered because the construction could not be seen from outside the property. Claimant also argues that the construction constituted a trespass and that because it is a continuing trespass the statute of limitations has not run on that claim.

The CITY counters that even if there were a trespass, that is not relevant to that date of valuation in a condemnation proceeding. The CITY also argues that even if the headwall and outlet are a continuing trespass, the trespass ended when the CITY acquired title on October 26, 2010, and the statute of limitations for a claim of trespass against the CITY of 1 year and 90 days runs from that date.

Where a property is taken by eminent domain, it is valued as of the date of the taking. ***B&B Food Corp., v State,*** **96 AD2d 893, 466 NYS2d 60 (2nd Dept 1983);** ***Matter of Salvation*** **Army, 43 NY2d 512, 402 NYS2d 804 (1978);** ***in re Board of Water Supply, 277 NY 452*** **(1938).**

Claimant in its appraisal justifies valuing the property as of September 26, 2005, on the grounds that the CITY's construction of the headwall and outlet constituted a defacto condemnation. In its motion papers however it argues that the headwall and outlet constitute a continuing trespass.

A defacto taking or inverse condemnation is similar to a trespass in that both involve a physical entry. However a trespass is temporary, while a defacto taking is a permanent ouster or interference with an owner's use of its property by one with authority to condemn. ***Corsello v Verizon,*** **18 NY3d 777, 994 NYS2d 732 (2012);** ***Sarnelli*** **v** ***City of New York,*** **256 AD2d 399, 681 NYS2d 578 (2nd Dept x998); C** ***arr v Town of Fleming,*** **122 AD2d 540, 504 NYS2d 904 (4th Dept 1986). In this present case, whether the claim is actually one of inverse condemnation or continuous trespass is not determinative as the Statute of Limitations ran as to either theory.**

Claimant's argument that there is no statute of limitations for a defacto taking, is incorrect. The Court of Appeals in ***Corsello v Verizon, supra.,*** **did not decide the issue of whether there was a three year limitation on inverse condemnation claims, because the plaintiffs in that case did not challenge that holding. However, the Court of Appeals did not overturn the Second Department's holding that the three statute of limitations is applicable to**

a claim of inverse condemnation. *Corsello v Verizon* at 787. The law in the Second Department remains that there is a three year statute of limitations for a claim of a defacto taking. *Corsello v Verizon,* 77 AD3d 344, 908 NYS2d 57 (2nd Dept 2010); *Sarnelli* v *City of New York,* 256 AD2d 399, 681 NYS2d 578 (2nd Dept 1998); CPLR 214[4].

Claimant also cited two cases, *White Sands Motel Holding Corp v Trustees,* 2014 *NY* Misc Lexis 4062, 2014 NY Slip Op 32385(U) (Su Ct Suffolk 2014) and *Seaview at Amagansett Ltd. v Trustees, 2014 NY* Misc Lexis 4064, 2014 NY Slip Op 32386(U) (Su Ct Suffolk 2014), for the proposition that there is no statute of limitations for an inverse condemnation claim. However, in those cases the Court recognized a three year statute of limitations but held that under the facts of those cases there was no inverse condemnation. The Court denied summary judgment because while there was not an inverse condemnation, Plaintiffs in those cases had made out a claim based on continuous trespass.

Similarly, *Blooming dales Inc., v New York City Transit Authority,* 13 NY3d 61, 886 NYS2d 663 (2009), cited by Claimant, involved a continuous trespass rather than a defacto taking.

A claim for inverse condemnation begins to accrue at the time of taking. *Corsello v Verizon,* 77 AD3d 344, 908 NYS2d 57 (2nd Dept 2010); *Sarnelli* v *City of New York,* 256 AD2d 399, 681 NYS2d 578 (2nd Dept 1998), even where the encroachment is an underground sewer line that was not discovered until ten years after installation. *Carr v Town Fleming,* 122 AD2d 540, 504 NYS2d 904 (4th Dept 1986). As Claimants did not make a claim for inverse condemnation within three years of the installation of the headwall and outlet in 2005, the claim for a defacto taking is time barred.

Putting aside the question of whether a claim of trespass affects the date a property taken by condemnation is valued, any claim of trespass is time barred as well.

Once title to the property vested in the CITY on October 26, 2010, any entry on the property by the CITY ceased to a trespass, and Claimant had no further claim of trespass as it no longer had an interest or estate in the property. see *Bloomingdales Inc., v New York City 7'ransit Authority,* i3 NY3d 61, 886 *NYS2d* 663 (wog). Thus, the statute of limitations for any claim for trespass began to run on October 26, 2010, at the *latest.*

The statute of limitations for a claim of trespass against the MT is one year and ninety days. General Municipal Law bo-l; *Bloomingdales Inc., u New York City Transit Authority,* 13 NY3d 61, 886 NYS2d 663 (2009). Thus, the statute of limitations on a *trespass claim* for the installation of the headwall and outlet on the property ran on January 25, 2012.

As both Claimant's defame taking and trespass claims are time barred, the property must be valued as of the date of vesting. Since Claimant's appraisal did not value the property as of vesting the appraisal has no probative value and must be stricken. *Matter af City ofNew York (Crown Heights 4M Amended Urban Renewal Plan), 1 Mimed* 913(A), 781 Mad 623, 2004 NY Slip OP 50052(b) (Su Kings 20041

WHEREFORE, the CITY's motion to strike Claimant's appraisal is granted and it is hereby

ORDERED, that the Claimant's appraisal report of June is, 2012 is stricken, and Claimant is precluded from introducing any testimony of its contents at trial. This constitutes the Decision and Order of this Court.

ENTER

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JSC

HON. WAYNE P. surrA
JAC.