

At a IAS Term, Part 89, of the Supreme  
Court of the State of New York, held for the  
County of Richmond, at 360 Adams St.  
Brooklyn, New York on the 22 day of January 2014.

HON. WAYNE P. SAITTA, JSC

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PACK IT AWAY STORAGE SYSTEMS, INC.,  
(BLOCK 1129, LOT 39)

Index No. 1686/2012

Claimant,

DECISION AND ORDER

-against-

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION, D/B/A EMPIRE STATE  
DEVELOPMENT CORPORATION,

Condemnor.

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Condemnor, NEW YORK STATE URBAN DEVELOPMENT CORPORATION,  
D/B/A EMPIRE STATE DEVELOPMENT CORPORATION, (hereinafter "ESDC") moves  
for leave to reargue this Court's decision dated August 9, 2013, and order dated  
September 5 2013, which denied Condemnor's motion to strike the fixture claim of  
Claimant, PACK IT AWAY STORAGE SYSTEMS, INC., (hereafter "PACK IT AWAY"),  
and Claimant PACK IT AWAY's cross motion for an order directing ESDC to file a Note  
of Issue and Certificate of Readiness for Trial.

Upon reading the Notice of Motion, dated November 1, 2013, and the Affidavit of  
Robert Von Ancken, dated November 1, 2013, and the Affirmation in Support of Charles  
S. Webb III, Esq., of Berger & Webb LLP, attorneys for Condemnor, dated November 1,  
2013, the exhibits and appendix of documents annexed thereto; the Notice of Cross-

Motion dated November 12 2013, and the Affirmation of Joshua H. Rikon Esq., of Goldstein, Rikon, Rikon, and Houghton, PC, attorneys for PACK IT AWAY, dated November 12 2013, and the exhibits annexed thereto; the Affirmation in Further Support of Charles Webb III Esq., dated December 11, 2013; the Affirmation in Reply of Michael Rikon Esq., dated December 13, 2013, and the exhibits annexed thereto, and after argument of counsel on December 19, 2013 and due deliberation thereon; ESDC's motion to reargue is denied and Claimants Cross-Motion to Strike is granted in part for the reasons set forth below.

ESDC argues that the Court erred in denying its motion to strike the fixture claim because the value of the fixtures was included in this Court's award for the value of the fee award to the owner of the property, in the case of *MK v New York State Urban Development Corporation* Index No. 1688/2012, and the Condemnor can not be made to pay for the same fixtures twice.

As of the vesting date, which was March 1, 2010, PJK Realty Corp. was the owner of the property, and PACK IT AWAY operated a self storage facility at the property. *PJK* filed a fee claim and after trial, this Court determined the value of the fee to be \$5,134,000.

ESDC argued that PACK IT AWAY's fixture claim should be stricken because PACK IT AWAY and PJK are related corporations which ran the property and the storage facility as a single operation, and that because the Court valued the property as a storage facility, the value of the fixtures was already included in the fee award to PJK.

The Court held that whether PJK and PACK IT AWAY were related was not the determinative issue, because if even if they were, they would still be entitled to an award

for both the fee and the fixtures because the fixtures were consistent with the highest and best use of the property. The material issue was whether the Court included value of the fixtures in the determination of the value of the fee in the award to PJK REALTY CORP. The Court held that PACK IT AWAY's fixture claim should not be dismissed because the fee award to PJK did not include the value of the fixtures.

In its motion to reargue ESDC submits an affidavit of its appraiser Robert Von Ancken in which he states that he valued the subject property as an operating self storage facility and as such his valuation included the fixtures necessary for that business including the storage units and lighting.

Claimant cross moves to strike Von Ancken's affidavit, and parts of the affirmation of Charles Webb III Esq., on the grounds that evidence which was not part of the original moving papers, is improper on a motion to reargue. Claimant further argues that even were the Court to consider the motion one to renew, the affidavit should still be stricken because it is evidence that was in ESDC's possession at the time they made the first motion.

The cross-motion should be granted as to Von Ancken's affidavit as it did not merely flesh out of facts presented in the initial motion, as contended by ESDC, but included new evidence. Von Ancken asserts in his affidavit that he included the value of the fixtures in his valuation of the fee. However, the affidavit was not included in the original motion to strike the fixture claim. *Also*, paragraph 13 and footnote of the Webb affirmation which include evidence not in the record such as 4 should be stricken.

Condemnor's contention that it only learned at the oral argument of the motion to strike that the Court mistakenly believed that Von Ancken included the fixtures in his

income capitalization analysis and not his comparable sales analysis is misplaced. First, the Court did not conclude that Von Ancken included the value of the fixtures in his income capitalization approach. The Court rejected that approach as unreliable, in this case, for lack of sufficient data, so it never reached the issue of whether fixtures were included in that approach. The Court merely questioned Condemnor's counsel as to his assertion that it did not matter which approach was used.

The Court noted in its original decision that the sales comparison approach was based on square footage rather than number of storage units. Von Ancken points out in his affidavit that self storage facilities are not valued based on number of units because of the varying mixes on unit sizes in different facilities. The Court does not disagree with a valuation based on square footage, however, the nature of square footage as an indicator of value is such that it does not necessarily incorporate fixtures in its valuation. *L.B. Oil Co. Inc., v State of New York*, 81 AD2d 856, 438 NYS2d 862 (2d Dept 1981).

Second, Von Ancken never stated in either his testimony at trial or in his appraisal report that his valuation of the fee included the fixtures.

In essence, Condemnor argues that it is implicit in his valuation because he valued the property as an operating self storage facility. Although Von Ancken claims in his affidavit that his report contains a detailed description of the fixtures, neither his appraisal report nor his trial testimony lists the fixtures other than to state the number of storage units. The record in the fee trial is silent as to what fixtures were in the building at vesting, or what their sound value was.

Further, although the comparable sales were also of operating self storage facilities, there was no evidence of any comparisons of the fixtures in them, or any

adjustments made to account for differences in the value of the fixtures in each property.

Von Ancken made adjustments for differences in the comparable sales but none dealt with fixtures of any the properties. The adjustments were made for market conditions, location, age/condition, functional utility, building height, and ICIP tax exemptions.

Von Ancken applied a 15% downward adjustment to comparable sales 1,2,and 4 for the age/condition of the comparable buildings, which were recently constructed or renovated. The explanation of the age/condition adjustments included in the appraisal does not discuss the age or condition of the fixtures of the subject property or any of the comparables. The explanation of this adjustment for sales 1 mentions only that the facility was recently renovated. The discussion as to sales 2 was based on an exterior inspection of the building and therefore could not have compared the fixtures. The explanation for the adjustment of sales 4 only states that the facility was recently constructed at the time of sales and does not describe or compare the fixtures.

The adjustments for functional utility were based primarily on the fact that the subject property was not climate controlled and lacked a passenger elevator. However, while a building air conditioning system, and a passenger elevator affect the value of a property used as a self storage facility, they are not fixtures, but part of the building.

The appraisal indicates that the adjustment for functional utility was also based on the modern design of the comparables. However, the appraisal does not describe the modern design, more specifically than increased density and superior layout. While a superior layout of units increases the value of a property, the layout of units refers to the

placement of the units not the fixtures. The appraiser's explanation of the functional utility adjustment does not discuss any of the fixtures or their value.

Based on the evidence that was presented at trial the Court did not include any consideration of the fixtures in determining the value of the fee because it had no evidence about the fixtures or their value before it.

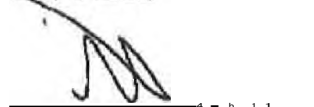
Condemnor was aware at the time of the trial of PJK's fee claim that there was a separate claim for the fixtures. Condemnor can not remain silent during the trial as to the nature and value of the fixtures in the subject property and comparable sales, and afterwards argue essentially, that it goes without saying that the value of the fixtures was included in the valuation of the fee.

For these reasons even if the Court were to consider Von Ancken's affidavit it would still have to deny the motion to reargue.

WHEREFORE, ESDC's motion for permission to reargue this Court's decision of August 9, 2013 and Order dated September 5, 2013 is denied; *and* PACK IT AWAY% cross-motion is granted to *the extent* of striking the Von Ancken affidavit dated November 1, 2013, and paragraph 13 and footnote four of the Webb affirmation dated November 1, 2013. This constitutes the decision and order of this Court.

Dated: Brooklyn, New York  
January 22, 2014

ENTER:

A handwritten signature in dark ink, appearing to read 'Wayne R. Saitta', is written over a horizontal line.

Pa. WAYNE R SAITTA  
JAC