

2014 NY Slip Op 33603(U)

**TANGLEWOOD COMMONS, LLC, Claimant,**  
**v.**  
**THE STATE OF NEW YORK, Defendant.**

Claim No. 118108, Motion No. M-84576.

Court of Claims.

June 2, 2014.

July 24, 2014.

Edward Flower, Esq., Flower Medalie & Markowitz, for Claimant.

Rose Farrell Lowe, Assistant Attorney General, Eric T. Schneiderman, NYS Attorney General, For Defendant.

## DECISION AND ORDER

STEPHEN J. LYNCH, Judge.

The claimant moves in this appropriation proceeding pursuant to Eminent Domain Procedure Law (EDPL) § 701 for an order directing an additional allowance to the claimant for actual and necessary costs, disbursements and expenses consisting of attorneys' fees, expert witness fees and disbursements incurred. The motion is opposed in part by the defendant.

The prior history of this case is set forth in detail in this Court's decision after trial dated November 21, 2013, filed December 16, 2013. Based upon that decision, judgment was entered in claimant's favor (inclusive of interest) in the amount of \$884,767.11 for all damages resulting from the appropriation of the premises <sup>111</sup>. The defendant's initial offer for the property taken (on August 29, 2008) was \$121,000.00. It is undisputed that the principal sum awarded after trial (that is, exclusive of interest) was almost five times the initial offer made by the defendant. The retainer agreement between the claimant and its attorney provides that the legal fee due counsel for prosecuting this claim is one-third of the amount recovered. The amount originally calculated in the affidavit of Richard Nelin, sworn to January 8, 2014 — offered in support of the motion — was adjusted by claimant upon its receipt of the judgment (received by claimant's attorney after the motion was made on January 27, 2014). That adjusted amount sought by claimant as reimbursement for attorneys' fees is \$239,829.00 (based upon claimant's calculation of the interest which must be accounted for in addition to the specific sum set forth as the total award in the judgment [see supplemental affirmation of Edward Flower dated February 7, 2014 at para. 5]). Defendant acknowledges that the issue of claimant's counsel's fees request is a matter for the Court's discretion (see *Matter of Malin v State of New York*, 183 AD2d 899 [2d Dept 1992]). The Court finds and concludes that the award was substantially in excess of the initial offer made by the defendant condemnor (see *Scuderi v State of New York*, 184 AD2d 1073 [4th Dept 1992]; *Schad v State of New York*, 259 AD2d 691 [2d Dept 1999]; *Karas v State of New York*, 169 AD2d 816 [2d Dept 1991]; *Matter of Hoffman v Town of Malta*, 189 AD2d 968 [3d Dept 1993]; *Matter of Town of Riverhead v Lobozzo*, 207 AD2d 789 [2d Dept 1994]; *Long Is. Pine Barrens Water Corp. v State of New York*, 144 Misc 2d 665 [Ct Cl 1989D]. The Court notes that defendant does not take issue with the precise calculation of the "one-third of all sums recovered" presented by claimant's counsel. Claimant's request for reimbursement of attorneys' fees is considered by this Court and found to be part of claimant's costs and expenses actually, necessarily and reasonably incurred herein by claimant pursuant to its agreement with counsel (see Exhibit "E" to affidavit of Richard Nelin sworn to January 8, 2014). Specifically, the amount sought as and for reimbursement of attorneys' fees, \$239,829.00, is approved and claimant is awarded that sum as and for its additional allowance for counsel's fees necessarily and actually incurred pursuant to EDPL § 701.

The claimant also requests an additional allowance as and for its disbursements incurred herein in the amount of \$531.75 (\$50.00 filing fee and \$481.75 deposition and trial transcript fees). This amount, \$531.75, is also found to be necessarily and actually incurred by claimant in the context of the instant claim and the claimant is therefore granted the additional sum of \$531.75 as an additional allowance for such disbursements. The Court notes that defendant does not object to this aspect of the relief sought (see affirmation of Rose Farrell Lowe dated February 12, 2014, at para. 9).

The proof presented by the claimant in support of its request for an additional allowance totaling \$41,271.00 for reimbursements for expert witness fees includes the affidavit of claimant's president, the affidavit of the real estate appraiser who testified on claimant's behalf at trial and the affidavit of the engineer who testified on behalf of claimant at trial. Of the total amount of expert fees sought, \$41,271.00, the claimant seeks \$31,075.00 for the real estate appraisal fees incurred and \$10,196.00 for the expert engineer fees incurred.

The real estate appraisal expert's affidavit details the asserted basis for the charges totaling \$31,075. Certain aspects of the work were billed at a flat rate (\$8,500.00 for the initial appraisal and \$3,500.00 per day for trial) and other aspects were billed at an hourly rate. During the period the appraiser was working for claimant, the rate for fees billed hourly went from \$300.00 to \$350.00 per hour. The Court finds that the reimbursement sought is warranted and that the fees incurred by claimant in engaging the services of its real estate appraiser were necessarily and actually incurred by claimant in this proceeding. Although defendant has challenged this expert's hourly rate and the increase thereof (during the period the expert worked for claimant), defendant has not presented proof sufficient to refute the showing by claimant as to its real estate expert. Turning to the request by claimant for an additional award based on claimant's incursion of expert fees for its engineer, the Court notes that claimant has offered the affidavit of the engineer who testified at trial (see affidavit of Michael J. Russo, sworn to January 20, 2014) The total amount charged by the engineering firm was \$10,196.00 based on \$200.00 per hour (and \$300.00 per hour for "court time", that is, attendance at trial). Although this aspect of claimant's request for relief is also opposed by counsel for the defendant, the assertion by counsel that certain of the charges are redundant is not substantiated. The Court finds the expert engineer fees to be reasonably, necessarily and actually incurred by claimant and the claimant is entitled to an additional allowance as requested, \$10,196.00, for such engineer expert fees.

Accordingly, it is ordered that judgment be entered in favor of claimant for an additional allowance of \$281,631.75 pursuant to EDPL § 701 without interest.

The motion is granted to the extent indicated and is otherwise denied.

al As referred to in the judgment, the premises is "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".

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