

At an IAS Term, Part 89 of the Supreme Court of the state of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of December 2018.

PRESENT:

Hon. Wayne P. Saida, Justice.

-----X

TKGSM-NY, LLC,
(Block 1120, Lot 28),

Claimant

Index No.
17858/2014

DECISION and
ORDER

-against-

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

Condemnor.

----- X

Claimant TKGSM-NY, LLC, seeks additional allowances for fees, pursuant to Eminent Domain Procedure Law § 701. The Condemnor, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, D/B/A EMPIRE STATE DEVELOPMENT CORP., (hereinafter "ESDC"), took title to Claimant's property located at 718-728 Atlantic Avenue, Brooklyn, New York (Block 1120 Lot 28) on September 19, 2014.

Upon reading the Notice of Motion of the Claimant TKGSM-NY, LLC, by Goldstein, Rikon, Rikon, and Houghton PC, attorneys for the Claimant, dated October 4, 2018, together with the Affirmation in Support of Joshua H Rikon, Esq., dated October 4, 2018, the Affidavit of Daniel Sciannameo, MAI, sworn to September 12, 2018, the

Affidavit of Michael G Burnam, sworn to September 12, 2008, and all exhibits annexed thereto; the Affirmation in Opposition of Adam H. Brodsky Esq., of counsel to Berger & Webb, attorneys for Condemnor, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, D/B/A EMPIRE STATE DEVELOPMENT CORP., dated October 18, 2018, and the exhibits annexed thereto; the Reply Affirmation of Joshua H Rikon Esq., dated October 23, 2018, and the exhibits annexed thereto; and all proceedings heretofore had herein; after argument of Counsel and due deliberation thereon, the Claimant's motion for additional allowances is denied for the reasons set forth below.

Claimant seeks additional allowances for attorney's fees, expert fees and disbursements pursuant to EDPL § 701. The section provides a two-prong standard for the award of fees. First, the award for the value of the property taken must be substantially in excess of the amount of the condemnor's proof. Second, the award of fees must be necessary for the condemnee to achieve just and adequate compensation. EDPL § 701

In determining whether the award is substantially more than the condemnor's proof, this court must measure the award against the amount of the condemnor's initial offer. (*Karas v. State of New York*, 169 A.D.2d 816, 565 N.Y.S.2d 185 [2nd Dept 1991]; *Done Holding Co. v. State of New York*, 169 A.D.2d 809, 565 N.Y.S.2d 178 [2nd Dept 1991]; *Application of New York City Transit Authority (Reed & Rattan)*, 160 A.D.2d 705, 553 N.Y.S.2d 785 [2nd Dept 1990].)

After trial, the Court awarded Claimant \$28,372,000 for the taking of the subject property. The difference between the award and the Condemnor's pre-vesting offer of \$25,275,000 is \$3,097,000, an increase of 12.2%.

Claimant asserts that the award for the property was substantially in excess of ESDC's pre-vesting offer and that an award of fees is necessary for claimant to achieve

adequate compensation. Condemnor argues that the award was neither substantially in excess of the pre-vesting offer, nor necessary for the Condemnee to achieve adequate compensation.

An increase of over three million dollars is clearly a substantial amount in absolute terms. The question presented is whether it is a substantial increase in light of the fact that it is only 12.2% higher than the offer. Or, put differently, whether EDPL § 701 requires that an award be a substantial increase both as an absolute amount, and as a percentage.

Claimant has cited several cases in which attorney's fees were awarded where the amount of the increase was far smaller than 3 million dollars, but the increase was 25% larger than the initial offer. (*Matter of NYC Transit Authority (Gun Bus Garage)*, 142 Misc 2d 629, 538 N.Y.S.2d 161 [Sup Ct, Bx County 1989] [an increase of \$656,000 which equaled 36% of the offer]; *Matter of Town of Islip v Sikora*, 220 A.D.2d 434, 632 N.Y.S.2d 160 [2nd Dept 1995] [an increase of \$184,207 which equaled 32% of the offer]; *Matter of City of New York (Broadway Triangle URA Stage 1)*, Index no. 21579/91 [Sup Ct, Kings County 1997] unreported [an increase of \$47,200 which equaled 29% of the offer].)

Condemnor cited two cases in which attorney's fees were disallowed, where increases which were less than \$100,000 and less than 25% of the offer. (in *re Village of Johnson City*, 277 AD2d 773, 715 NYS2d 775 [3d Dept 2000] [an increase of \$81,699 which equaled 19% of the offer]; and *In re County of Tompkins*, 298 AD2d 825, 749 NYS2d 332 [3d Dept 2002][an increase of \$65,000 which equaled 23%].)

Claimant in reply cited a case which held that an increase of \$550,000, which was only 22.9% over the offer, was a substantial increase. (*Commissioners of Great Neck Park District of Town of North Hempstead v Kings Point Heights LLC*, 2009 NY Slip Op 30459[U] [Sup Ct, Nassau County 2009].)

There are cases holding that increases that are small as an absolute amount can be substantial, where they represent an increase of more than 25%, and cases holding that increases that are small as an absolute amount are not substantial, where they represent an increase of less than 25%. However, the Court could find no cases that considered whether an increase in the range 3 million dollars, but which represented an increase in the range of 12%, constituted a substantial increase.

EDPL § 701 currently contains no minimum percentage threshold for determining whether an increase is substantial. Prior to the 1987 amendment, EDPL § 701, did not allow for attorneys' fees, and it restricted the award for expert fees to cases in which the award was at least 200% of the condemnor's proof.

It is significant that in amending EDPL§ 701, the legislature did not set a different the percentage threshold, but instead eliminated the requirement that the increase be a certain percentage of condemnor's proof and substituted the requirement that the increase be substantial. Laws of New York 1987, ch 771.

The requirement that the increase be substantial is by its nature, particularly fact driven, and requires a significant exercise of discretion by the court.

In this case, however they Court need not, and does not determine whether the increase is substantial, because Claimant does not satisfy the second prong of EDPL§ 701.

The second prong requires the Claimant to establish that the additional award for fees is necessary to achieve just and adequate compensation. (*Hakes v State of New York*, 81 NY2d 392, 599 NYS2d 498 [1993].) In amending EDPL§ 701, the legislature did not make the awards of fees mandatory but left them the court's discretion, upon a showing both that the increase was substantial, and the fees were necessary to achieve just compensation.

Claimant argues that its attorneys and expert fees were necessary because absent its decision to litigate the matter, and the submission and testimony by its appraiser, Claimant would not have achieved the higher award.

While this reasoning is true on a certain level, it is contrary to the language of EDPL§ 701 and to the legislative history of the 1987 amendment. This line of reasoning would render meaningless the separate requirement of EDPL§ 701 that the additional allowance be deemed necessary for just compensation.

At the time that the 1987 amendment to EDPL § 701 was being considered, concerns were raised that eliminating the strict limits on additional allowances could become an incentive to frivolous litigation by condemnees. In response to those concerns, then Governor Mario Cuomo noted that as a specific safeguard against such abuse the proposed amendment required that "the court must find that the recovery of litigation expenses is necessary for the condemnee to receive just and adequate compensation." Governor Cuomo's memorandum approving bill. (1987 McKinney's Session Laws, 210th Session, at p. 2724.)

It is clear that the legislature intended the requirement that the award be necessary to achieve just and adequate compensation mean something more than a showing that a claimant would not have received the substantially higher award without litigation. The requirement limits additional compensation to those portions of the attorneys', and other professionals' work that provided a basis for the higher award. The intent of the amendment was not to award compensation for efforts that advanced speculative or inflated valuations that were not accepted by the court. (*Hakes v State of New York*, 81 NY2d 392, 599 NYS2d 498 [1993].) Where the proof offered by a claimant has had no effect on the final award, then it cannot be found to have been necessary to achieve just

and adequate compensation. (*see, First Bank & Trust Co. of Corning v State of New York*, 184 AD2d 1034, 585 NYS2d 261, [4th Dept 1992],affd 81 NY2d 392.)

Here the Claimant had a contingency fee arrangement with its attorneys. In general, a contingency fee is, by design, proportional to the actual increase achieved in situations where the Court relies on the Claimant's valuation in part. However, where the Claimant's valuation was not a basis for the Court's determination, then the fee is not necessarily related to efforts that resulted in the increased award.

In determining the fee award in this case, the Court relied principally on the Condemnor's appraisal, and rejected Claimant's appraisal on the issues that were contested.

The parties both agreed that the highest and best use of the property was its existing use, but they differed widely in their valuation. Claimant valued the property at \$34,500,000 while Condemnor's pre-vesting offer was \$25,275,000.

Although, the difference in value asserted by each side was large, it stemmed from only three issues. The first was a difference in the amount calculated as the property's remaining tax benefits pursuant to the Industrial and Commercial Incentive Program (ICIP). The second was a difference in the net operating income (NOI). The third was a difference in capitalization rates applied to the NOI by each side.

The first difference regarding the remaining ICIP benefits stemmed from an error by both appraisers in calculating the remaining benefits. In their initial appraisals the Claimant stated there was \$1,384,589 remaining, while Condemnor stated there was \$198,735 remaining. Both figures were incorrect, although Claimant's figure was far closer to the correct amount. The amount of remaining ICIP benefits was not a matter of judgment but simply a calculation based on the ICIP program formula.

By the start of the trial both appraisers corrected their reports to reflect the fact that the value of remaining ICIP benefits was \$1,256,158. An award for the time spent on this point is not warranted, given that both sides had resolved this point before trial and the time and effort needed to correct the figure was not great.

The second difference between the valuations involved the net operating income (NOI). Both sides valued the property using the income capitalization approach, by which the income of the property is capitalized by dividing the annual NOI by an appropriate capitalization rate. (The Claimant also valued the property using the sales comparison approach, however the Court rejected Claimant's sales comparisons.)

Claimant estimated the NOI at \$1,509,403 and Condemnor estimated the NOI at \$1,400,192. The NOI is the result of subtracting the operating expenses from the effective gross income (EGI) of the property. Claimant's estimated EGI was \$67,253 higher than Condemnor's, and Claimant's estimated expenses were \$41,958 lower than Condemnor's.

The court rejected Claimant's operating expense estimate and adopted Condemnor's operating expense estimate.

The Court also rejected Claimant's EGI estimate and adopted Condemnor's EGI estimate with one adjustment. The Court eliminated a deduction from EGI for a service charge of \$36,955, because the Condemnor's appraiser could not explain the basis for the deduction, during his cross examination. The Court eliminated of this deduction and found the property's EGI to be \$¹,437,¹47.

However, the inappropriateness of the service charge was not part of Claimant's appraiser's valuation. The difference in the parties' EGI estimates resulted from Claimant's appraiser estimating the income from the rental of storage units by annualizing one month's rent, while Condemnor's appraiser used the actual rental figures

for the twelve months preceding the vesting. The Court adopted Condemnor's estimate of rental income from storage units. Therefore, Claimant's valuation was not a basis for that part of the increased award resulting from the \$36,995 increase in NOI.

The third difference, which was the most significant, was the capitalization rate used by each side. Claimant used a capitalization rate of 4.5% while the Condemnor used a capitalization rate of 5.5%. The majority of Claimant's efforts were directed towards supporting its 4.5% capitalization rate. For reasons stated in the award decision, the Court rejected Claimant's cap rate of 4.5% as unsupported by reliable data.

The Court adjusted Condemnor's cap rate of 5.5% slightly downward to 5.3%. The Court made this adjustment to account for the fact that 5.5% was the average cap rate for Class A self-storage facilities in the top 50 Metropolitan Statistical Areas, while the property's location was superior to the average location in the top 50 Metropolitan Statistical Areas.

The Court relied on data from the Real Estate Research Corporation (RERC), for its conclusion that cap rates for New York City properties would be lower than the average for the top 50 Metropolitan Statistical Areas. This data was included in Claimant's appraisal report. However, Claimant's appraiser did not cite this data for the proposition that the cap rate for the property should be lower than the top 50 Metropolitan Statistical Areas average. Claimant's appraiser testified that he included the RERC data in his appraisal only to show that self-storage facilities have lower cap rates than generic industrial properties.

Neither the Claimant's appraisal report nor the appraiser's testimony at trial were the basis for the Court's minor adjustment to the cap rate used by Condemnor.

Both the report and the testimony of Claimant's appraiser were directed at establishing an unrealistic cap rate that was not supported by the evidence and did not contribute to the increased award.

For the above reasons, an allowance for attorneys and appraiser's fees is not necessary to ensure Claimant just and adequate compensation in this case.

Wherefore, it is ORDERED that Claimant's motion for additional allowances pursuant to EDPL § 701 is denied. This constitutes the decision and order of the Court.

ENTER



JSC

e. min&