

DASHLEY REALTY, INC.
v.
STATE OF NEW YORK

2017-051-068
Claim No. 118613
Motion No. M-90630

New York State Court of Claims

January 4, 2018

Synopsis

Court granted the State's EDPL 304 (H) motion for recoupment of the amount of the advance payments in excess of the Court's eminent domain award.

Case information

UID:	2017-051-068
Claimant(s):	DASHLEY REALTY, INC.
Claimant short name:	
Footnote (claimant name) :	
Defendant(s):	STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	118613
Motion number(s):	M-90630
Cross-motion number(s):	
Judge:	DEBRA A. MARTIN
Claimant's attorney:	KEANE & BEANE, P.C. BY: JOEL H. SACHS, ESQ.
Defendant's attorney:	HON. ERIC T. SCHNEIDERMAN New York State Attorney General BY: MICHELE M. WALLS, ESQ. Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	January 4, 2018
City:	Rochester
Comments:	
Official citation:	

Appellate results:	
See also (multicaptioned case)	

Decision

The following papers were read on defendant's motion for judgment pursuant to Section 304 (H) of the Eminent Domain Procedure Law (EDPL) against the claimant in the sum of \$145,000.00, with appropriate interest:

1. Notice of Motion, filed June 16, 2017;
2. Affirmation of Michele M. Walls, AAG, with attached exhibits, dated June 16, 2017;
3. Affidavit of Joel H. Sachs, Esq., sworn to October 26, 2017.
4. Reply Affirmation of Michele M. Walls, AAG, dated November 3, 2017.

This Court rendered a trial decision, filed May 19, 2017, awarding claimant Dashley Realty, Inc. \$419,000 in damages against the State of New York arising from an appropriation of two parcels of real property. (*Dashley Realty v State of New York*, UID No. 2017-051-504 [Ct Cl, Martin, J., Feb. 24, 2017.]) The amount of damages awarded to claimant was less than the State's advance payments to claimant in the amounts of \$340,000 and \$224,000 on December 17, 2009. Pursuant to EDPL 304 (H), the State now moves for an order awarding it judgment in the sum of \$145,000 from claimant, which represents the difference between the State's advance payment and the Court's award. In addition, the State seeks statutory interest from the date the checks were issued to claimant. The Court grants the State's motion for the reasons set forth below.

Eminent Domain Law § 304 (H) states "[w]hen an advance payment to a condemnee made pursuant to this section by the condemnor exceeds the award of the court for that property, the court shall, on motion, enter judgment in favor of the condemnor for the amount of such excess and appropriate interest." Therefore, the requirement to render judgment in favor of the State is mandatory, not permissive.

Moreover, it is undisputed that in July of 2017, prior to the State issuing the advance payment checks, the parties entered into an agreement that provided for this scenario. Paragraph seven, in each of the agreements, provides, in part:

"[i]n the event the amount so found by the Court is less than the amount of said advance payment, upon the filing in the office of the Clerk of the Court of Claims of a Certified copy of this agreement together with Certification by the Comptroller of the State of New York of such payment and upon application made to the Court on at least eight days notice to Claimant, the Court shall direct the Clerk to enter judgment dismissing the claim and awarding to the State the difference between the award as found by the Court and the amount of said advance payment with appropriate interest."

(see Wall Affirmation, Exhibits A ¶ 7 & B ¶ 7.)

Accordingly, there is no doubt of the State's entitlement to recoup the overpayment. The claimant's argument regarding the prior appraisal that was the basis of the State's advance payment is specious. It is well settled that an appraisal prepared in anticipation of litigation and in contemplation of settlement "enjoy[s] the conditional immunity from disclosure which is conferred on material prepared for litigation by CPLR 3101 (d)." (see *CMRC Corp. v State of New York*, [270 AD2d 27](#), 27 [1st Dept 2000][internal quotation marks and citation omitted].) In addition, the parties agreed that the prior appraisal would not be evidence of the value of the claim. (see Walls Affirmation, Exhibits A ¶ 7 & B ¶ 7.) Claimant's remaining contentions need not be addressed because

no motion pursuant to CPLR R 2221 is before the Court.

In light of the above, the State's recoupment motion (M-90630) is granted. The Chief Clerk of the Court is directed to enter judgment in favor of the State of New York in the amount of \$145,000 plus statutory interest from December 17, 2009 through the date of this decision and with interest thereon to the date of the entry of judgment. (see CPLR 5001-5003; Court of Claims Act § 19 [1].)

January 4, 2018

Rochester, New York

DEBRA A. MARTIN

Judge of the Court of Claims