

[Matter of City of New York \(Victory Blvd. from Seneca Ave. to Grand Ave.\)](#)

Supreme Court of New York, Richmond County

January 31, 2020, Decided

CY 4508/2016

Reporter

2020 N.Y. Misc. LEXIS 367 *; 2020 NY Slip Op 50119(U) **

Counsel: [*1] For Plaintiff: Corp Counsel of the City of New York, New York, New York.

[**1] In the Matter of the Application of the City of New York relative to Acquiring Title in Fee Simple to Property, located inin Staten Island, including All or Parts of Victory Boulevard from Seneca Avenue toGrand Avenue In the Borough of Staten Island, City and State of New York.SENECA CLOVE CORP. (Damage Parcels 26, 26A and 27A [Block 651, Part of and to Adjacent to Lot 1), Claimant, against THE CITY OF NEW YORK, Condemnor.

For Defendants: Ashley Levi, Esq., Goldstein, Rikon, Rikon and Houghton, P.C., New York, New York.

Judges: Wayne P. Saitta, J.

Opinion by: Wayne P. Saitta

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Opinion

Core Terms

Claimant's, appraisal, severance damage, projected, gas station, vacant, highest and best use, stream, subject property, cross motion, cash flow, discounted, pumps, condemnation, hypothetical, valuation, built

Wayne P. Saitta, J.

Condemnor CITY OF NEW YORK having moved to strike the portion of Claimant's appraisal that evaluates severance damages, and the Claimant SENECA CLOVE CORP. having cross moved to strike the CITY's appraisal, and the motion and cross motion having come before the Court on, January 9, 2020, and upon reading the Notice of Motion, dated September 10, 2019, the Affirmation of Holly R. Gerstenfeld, Esq., of the Office of Corporation Counsel 100 Church Avenue New York, New York 10007, attorney for the CITY OF

NEW YORK (CITY) dated September 10, 2019, and the exhibits annexed thereto; the Cross Motion dated October 24, 2019, the Affirmation of Matthew Guber Esq., of Goldstein, Rikon, Rikon, and Houghton PC, 381 Park Avenue South Ste 901, New York, New York 10016, attorneys for Claimant, dated [**2] October 24, 2019 and the exhibits annexed thereto, the Affidavit of James Realbuto, sworn to October 23, 2019 and the exhibit annexed thereto; the Reply Affirmation of Holly R. Gerstenfeld [*2] Esq., dated December 11, 2019 and the exhibits annexed thereto; the Reply Affirmation of Matthew Guber, Esq., dated December 18, 2019; and after argument of counsel and due deliberation thereon, the Condemnor's motion is granted and the Claimant's cross motion is denied for the reasons set forth below.

The underlying proceeding involves the condemnation of part of Claimant's property on Staten Island by the CITY as part of a road widening project. The CITY vested title in a 2,308 square foot strip of land running along the full length of the property bordering on Victory Boulevard on February 17, 2017. The property is improved by a vacant one story building that formerly housed a convenience store. Appraisal reports have been exchanged by the Condemnor and Claimant.

The CITY now moves to strike that part of Claimant's appraisal that includes severance damages on the grounds that that portion of the appraisal improperly valued severance damages for a vacant parcel by using a discounted cash flow analysis of a hypothetical stream of income.

The Claimant cross moves to strike to CITY's appraisal arguing that it improperly values the property as vacant.

In this case, Claimant's appraisers [*3] found the highest and best use of the property was as a gas station and that before the taking there was room for three gas pumps and after the taking there was room for only two pumps. They determined direct damages from the taking by comparing the land

value of the entire property and then subtracting the land value of the remainder property. They determined the value of the land through the sales comparison approach.

They then determined the severance damages by a discounted cash flow analysis. The appraisers compared projected income from three gasoline pumps to projected income from two gasoline pumps over a period of fifteen years and calculated the present value of each projected income stream. They then valued the severance damages as the difference between the present value of the two projected income streams.

CITY's Motion

The CITY argues that this analysis of severance damages was improper because the land was vacant on the date of vesting and the severance damages were based on a hypothetical income from a non-existent gas station.

It was not improper to value the subject property as a gas station merely because the property was not being put to that use on the date of vesting. The [*4] measure of damages in a condemnation case 'must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time. ([Matter of 730 Equity Corp. v. New York State Urban Dev. Corp.](#), 142 AD3d 1087, 37 N.Y.S.3d 599 [2nd Dept 2016]; [Chester Indus. Park Assoc., LLP v. State of New York](#), 65 AD3d 513, 884 N.Y.S.2d 243[2nd Dept, 2009]).

The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future (see [Matter of City of New York \[Broadway Cary Corp.\]](#), 34 NY2d 535, 309 N.E.2d 870, 354 N.Y.S.2d 100 [1974]; [Matter of Queens W. Dev. Corp. \[Nixbot Realty Assoc.\]](#), 139 AD3d 863, 33 N.Y.S.3d 274 [2nd Dep 2016].)

Whether a gas station was the most productive use of the subject property before or after the taking is a question of fact to be determined at trial.

At issue in this motion to strike, is not valuing the subject property as a gas station but whether it was proper to use a discounted cash flow analysis for a facility that had not yet been built.

While the CITY has characterized the property as vacant, there is currently an unoccupied one-story building on the property that was formerly used as a convenience store. The existence of the building does not change the analysis of whether the income approach was proper because assuming the property would be used as a gas station, the gas station, including pumps and storage tanks had yet to be constructed.

It is well established that a hypothetical projection [*5] of income of a non-existent facility can not be the sole basis a valuation of a property taken in **condemnation**. (*Arlen v State of New York*, 26 NY2d 346, 258 N.E.2d 890, 310 NYS2d 465 [1970]; *Levin v State of New York*, 13 NY2d 87, 192 N.E.2d 155, 242 NYS2d 193 [1963]; *MTA v Washed Aggregate Resources*, 102 AD3d 787, 958 N.Y.S.2d 405 [2nd Dept 2013]; *Briarcliff Associates Inc. v Town of Cortlandt*, 272 AD2d 488, 708 N.Y.S.2d 421 [2nd Dept 2000].)

Importantly, the rule does not prohibit the admission or consideration of a projected stream of income from a not yet built facility, it bars a valuation based solely on such projected income.

In *Arlen*, the Court of Appeals held that leases relating to land that was vacant on the date of vesting could be given some weight as enhancing the value of vacant parcels. *Arlen v State of New York*, at 352, 468.

In *Levin v State*, the Court affirmed a Court of Claims decision in which the court admitted a valuation in which the appraiser capitalized income from the leases of not yet existing buildings, explaining that the Court of Claims "did not fall

into the error of valuing the property by capitalizing the net rental income as might have been proper if the building had been completed and commenced ." *Levin, at 91, 195*. The Court held that the Court of Claims did not err in admitting evidence of the rental income, noting that "[a] sagacious and experienced prospective purchaser on the day of the taking would undoubtedly have taken into consideration the net rental income which might have been derived from this property if the taking [*6] had not intervened and if the executed lease had been fulfilled". *id at 91, 195*.

Also, in *Mattydale v State*, 303 NY 974, 106 N.E.2d 59 (1952), the Court of Appeals had reversed an Appellate Division decision which had modified a judgment because the court below had considered evidence of prospective rents from a not yet built shopping center.

However, in this case, unlike *Arlen*, *Levin*, and *Mattydale*, the Claimants appraisers relied solely on the projected rents of the planned gas station to determine the severance damages. Further, the appraisers treated the income from the project gas pumps as if they represented an income flow already in being and did not take into account the costs of constructing the gas station.

There is some authority for the proposition that it may be proper to value property on the capitalization of non-existent stream of income from a projected improvement when direct sales comparisons are not available. (*Matter of Pickerell v Town of Huntington*, 272 AD2d 331, 707 NYS2d 477 [2nd Dept 2000]; *Mtr of Con Ed of New York [1521 Sq]*, 193 AD2d 603, 597 N.Y.S.2d 429 [2nd Dept 1993].) However, there is nothing in Claimants appraiser's report which evidences that there are not comparable sales available to demonstrate the alleged severance damages.

Additionally, the use of a discounted cash flow analysis is more appropriate to testing the [**3] feasibility of a highest and best use, or in valuing the taking [*7] of a property interest with a defined

period of time, such as a lease. The discounted cash flow analysis done by the Claimant's appraisers here measured the severance damages solely by the loss of projected income and did not determine how that loss of income would affect the value of the property. It measured loss to the business rather than loss of value of the property.

Where the condemnor has not taken a business to operate it but has only taken the land on which it was located, an owner is not entitled to compensation for the value of the business. ([Bothwell v. US, 254 U.S. 231, 41 S Ct 74, 65 L. Ed. 238, 56 Ct. Cl. 467 \[1920\]](#); [Banner Milling Co. v State of New York, 240 NY 533, 148 N.E. 668 \[1925\]](#).)

Investors would consider the project income to be expected from a property to value it. However, it is an error to simply adopt the projected income or stream of income as a value of the property. One must measure the impact that the income stream, or in this case the difference between the before and after projected incomes, on the value of the property by appropriate market indicia such as comparable sales or capitalization rates, and also adjust for the fact that the facility has not yet been built.

Further, the failure to determine the extent to which the alleged loss of income would affect the value of the property is compounded [*8] by the fact that appraisers relied on income data from other properties provided by the Claimant. They did not make their own determination whether those properties were comparable to the subject property or were an accurate reflection of the market.

Claimant's appraisers have impermissibly relied solely on the present value of a projected stream of future income from an unbuilt gas station to determine the value of the remainder parcel after the taking. For this reason, the portion of the appraisal relating to severance damages should be stricken.

It has been held that in a condemnation case a

motion in limine to strike an appraisal is in essence a motion for summary judgment. ([Matter of City of New York, 21 Misc 3d 1127\[A\], 875 N.Y.S.2d 819, 2008 NY Slip Op 52260\[U\] \[Su Ct, Kings County 2008\]](#); [Matter of City of New York \(Grantwood Retention Basin\), 33 Misc 3d 586, 929 N.Y.S.2d 478 \[Su Ct, Richmond County 2011\]](#).)

However, striking an appraisal does not always justify the granting of summary judgment. The appraisals in an eminent domain case are not the evidence of value and are not a substitute for the testimony of experts. ([In re City of New York, 1 Misc. 3d 913\[A\], 781 N.Y.S.2d 623\[A\], 2004 NY Slip Op 50052\[U\] \[Su Ct Kings County 2004\]](#); [In re Town of Guilderland, 267 AD2d 837, 700 NYS2d 287 \[3rd Dept, 1999\]](#).)

The purpose of the appraisals is to allow the parties to prepare for trial and avoid gamesmanship and surprises. ([Parisi v State, 62 Misc 2d 378, 308 NYS2d 504 \[Ct. Cls., 1970\]](#); [Novickis v State of New York, 44 AD2d 508, 355 NYS2d 667 \[4th Dept 1974\]](#).)

Summary judgment is only appropriate where there are no questions of fact to be determined.

In this case, Claimant's appraisal is defective only in using an improper method [*9] to value the alleged severance damages. The appraisal is sufficient to raise questions of fact as to the highest and best use of the property, and whether the remainder parcel has suffered severance damages because it can no longer be used for a three-pump gas station.

The Second Department has long held that where an appraisal is based on an improper method of valuation it is appropriate to require a new appraisal.

"A condemnation proceeding is not a private litigation. There is a constitutional mandate [**4] upon the court to give just and fair compensation for any property taken. This means 'just' to the claimant and 'just' to the people who are required to

pay for it. The rule is abundantly clear that property must be appraised at its highest and best use and paid for accordingly. Where we find it is not as we must necessarily do in this case, an improper theory of damages having been employed, we must remit for retrial upon the proper theory" (*Yaphank Development Co Inc. v County of Suffolk*, 203 AD2d 280, 609 N.Y.S.2d 346 [2nd Dept, 1994]; *Micali Cadillac—Oldsmobile v. State of New York*, 104 AD2d 477, 479 N.Y.S.2d 77 [2nd Dept, 1984], quoting *Matter of County of Nassau*, 43 AD2d 45, at 48, 349 N.Y.S.2d 422, at 426 [2nd Dept 1973]).

As Claimant's appraisal has raises questions of fact, summary judgement is not appropriate, and Claimant should be directed to file a new appraisal utilizing a proper method of valuation.

Claimant's Cross Motion

The objections [*10] raised by Claimant's cross motion to strike the CITY's appraisal are unfounded. Claimant argues that the CITY's appraiser valued the subject property as if its highest and best use were to remain vacant rather than as a potential development site. However, the CITY did value the subject property as a potential development site. The CITY valued it under the hypothetical condition that the lot was vacant but valued it as vacant based on a highest and best use of a site for commercial development built to maximum density. The CITY appraiser then analyzed comparable sales of land that were suitable for development.

The validity of the hypothetical conditions of the CITY appraiser, as well as his determination of highest and best use are questions of fact which must be decided at trial and are not a basis to strike the CITY's appraisal.

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

ORDERED, that the portions of Claimant's appraisal report of August 3, 2018 which alleged severance damages based on a discounted cash flow analysis, are stricken, and Claimant is precluded from introducing [*11] any testimony as to the contents of those portions at trial; and it is further

ORDERED, that Claimant is granted leave to file a new appraisal report within 90 days of service of this order upon Claimant's counsel.

This constitutes the Decision and Order of this Court.

Dated: January 31, 2020

Brooklyn, New York

End of Document