

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

COUNTY OF BERGEN,

Plaintiff,

v.

ROSEMARIE ARNOLD, MORGAN
STANLEY DEAN WITTER CREDIT
CORPORATION; BOROUGH OF
SADDLE RIVER

Defendants.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

BERGEN COUNTY

DOCKET No. BER-L-734-15

CIVIL ACTION

OPINION

Argued: June 5, 2015

Decided: June 9, 2015

Honorable Robert P. Contillo, P.J.Ch.

Robert M. Jacobs, Esq., appearing on behalf of the plaintiff, County of Bergen (Winne, Banta, Hetherington, Basralian & Kahn, P.C).

Jonathan Leitman, Esq. appearing on behalf of the defendant, Rosemarie Arnold (Law Offices of Rosemarie Arnold).

I. Statement of the Case

This matter is before the court by way of a Verified Complaint and Order to Show Cause filed by the plaintiff County of Bergen (the “County” or “Plaintiff”) on January 22, 2015. Defendant Rosemarie Arnold (“Defendant” or “Arnold”) is the owner of real property located at 7 Lower Cross Road, Saddle River, New Jersey (the “Subject Property”). (Complaint at ¶ 7). The motion was argued on June 5, 2015, and the court reserved decision.

In 2012, the County determined to acquire three (3) permanent easements on Defendant’s property in order to achieve the ongoing maintenance and repairs of the Lower Cross Bridge (the

“Bridge”).¹ (Ex. C to Complaint (“Appraisal Report”). The easements are as follows: (1) a 47 square foot permanent bridge easement; (2) a 301 square foot permanent slope easement located on the southerly side of Lower Cross Road; and (3) a 130 square foot permanent slope easement located on the northerly side of Lower Cross Road. (Ex. A to Complaint). The northerly permanent slope easement rests on the plot of land owned by Defendant. (Ibid.).

In July, 2012, Plaintiff requested a one year temporary easement for use of Defendant’s property during the reconstruction of the Bridge. (Ex. A to Certification of Jonathan Leitman, Esq. (“Leitman Cert.”), hereinafter Affidavit of Rosemarie Arnold (“Arnold Aff.”), at ¶ 3). Defendant allegedly agreed to a six (6) month easement as long as an engineer of her choosing confirmed that the reconstruction would not worsen the flooding of her property, and that the County would not place gabions² or riprap³ on her property. (Arnold Aff. at ¶ 4). Defendant further claims she never signed the paperwork for the temporary easement. (Id. at ¶ 9). Nevertheless, the County’s agents entered onto Defendant’s property in order to undertake the reconstruction of the Bridge. (Id. at ¶ 10). As a result of the reconstruction, Defendant contends Plaintiff’s agents trespassed on her property, created dangerous and hazardous conditions, removed a fence and two large trees, littered her property, dirtied her house and pool with dust, and placed permanent gabions and riprap on her property. (Ibid.). In letters dated March 7 and March 26, 2013, Defendant demanded the County remove the gabions from her property. (Ex. C to Leitman Cert.).

¹ The County determined that, due to the poor condition of the bridge’s substructure and other defects in the foundations and footings, the best course of action was to demolish the existing Bridge and build a new Bridge.

² A wirework basket or cage filled with rock, earth, or other material used in building a support or abutment.

³ Loose stone used to form a foundation for a breakwater or other structure. Commonly used to fill gabions.

On July 9, 2014, Plaintiff's counsel requested invoices in connection with repairs to Defendant's property that Defendant alleged to have paid for as a result of damage from the reconstruction project. (Ex. E to Leitman Cert.). Defendant's counsel forwarded those invoices on July 22, 2014. (Ex. F to Leitman Cert.). Then, on August 28, 2014, the County offered Defendant \$8,287.79 as compensation for the three (3) easements (\$6,000.00) and for the damage to Defendant's property (\$2,287.79), and included a copy of a May 8, 2013, Appraisal Report. (Ex. G. to Leitman Cert.). On September 8, 2014, Defendant's counsel advised the County that Defendant wanted to hire an independent appraiser in order to counter the County's offer, and further advised that she expected compensation for litter on her property, deprivation of her full use and enjoyment of her property, removal of a fence, disturbance of landscaping; destruction of the bucolic nature of the property, trespass, and removal of two trees of sentimental value to her. (Ex. H to Leitman Cert.). Defendant also requested an explanation as to why the County needed the permanent easements. (Ibid.). Plaintiff's counsel responded on October 29, 2014, stating:

the permanent easements in question are required by the County of Bergen in order to ensure its ability to maintain both the structure of the bridge itself, as well as the slope and grading which are associated with the structure. This includes the fact that the structure will be subject to periodic inspections by the State of New Jersey and would be subject, if necessary, to appropriate maintenance, as well as any repair work which may be mandated as a result of such periodic inspections.

(Ex. I to Leitman Cert.). Plaintiff's counsel then requested Defendant advise the County within fourteen (14) days as to whether she would accept the offer of \$8,287.79. (Ibid.).

On November 11, 2014, Defendant's counsel notified Plaintiff's counsel that the County had not answered Defendant's inquiry as to why it now required three easements, when the Bridge had been in existence for over eighty-seven (87) years without any easements. (Ex. K to

Leitman Cert.). Defendant's counsel advised Plaintiff's counsel that Defendant wishes to engage in bona fide negotiations, but "until [the County has] responded to the foregoing inquiry, [Defendant] will not be in a position to respond to [the County's] offer." (Ex. K to Leitman Cert.). Plaintiff's counsel responded on November 19, 2014, stating that as the Bridge had been completely replaced, the County believed the easements were appropriate and necessary, and informing Defendant that the County would initiate eminent domain proceedings to acquire the easements. (Ex. L to Leitman Cert.). Defendant's counsel then sent a letter on November 20, 2015, expressing Defendant's position that Plaintiff was not negotiating in good faith and had still failed to explain why the easements were necessary, and re-asserting her right to hire an independent appraiser. (Ex. M to Leitman Cert.).

The County Engineer Joseph Femia ("Femia") certifies that, prior to the reconstruction of the Bridge in the summer of 2012, the County made the determination that it would be necessary to acquire permanent easements in connection with the demolition and reconstruction of the Bridge. (Certification of Joseph Femia ("Femia Cert.") at ¶ 2). Femia explained that the County requires the easements in order to ensure its ability to maintain and repair the structure of the Bridge, as well as the grading associated with the gabion mattress on the embankment. (Id. at ¶ 3). Femia further asserts the Bridge is subject to two-year depth inspections by the State of New Jersey Department of Transportation, and would be subject to appropriate maintenance and repair work as a result of the inspections. (Ibid.).

Plaintiff filed this Verified Complaint and Order to Show Cause on January 22, 2015. The court signed an order on February 27, 2015, authorizing Plaintiff to deposit \$8,287.79 with the court, and entitling Plaintiff to immediate and exclusive possession of the property

comprising the three (3) easements.⁴ However, on March 13, 2015, the parties entered a consent order vacating the February 27, 2015, order. The court then entered a new Order to Show Cause on May 7, 2015, in which Plaintiff seeks the following relief: (A) a determination that the County has duly exercised its authority to acquire the condemned property—the easements, and (B) the appointment of three (3) disinterested commissioners, residents of the County of Bergen, to fix the compensation to be paid for the taking of the property interests.

II. Plaintiff's Argument

Plaintiff argues it is entitled to the exclusive possession and use of the permanent easement, southerly permanent slope easement, and northerly permanent slope easement (collectively “the Easement Property”), as set forth in the Verified Complaint and attaches metes and bounds description, pursuant to N.J.S.A. 20:3-17 et seq. . (Declaration of Taking at ¶ 2). Plaintiff contends it is necessary and proper to acquire permanent easements for the ongoing maintenance and repairs of the reconstructed Lower Cross Bridge. (Id. at ¶ 3).

III. Defendant's Opposition

First, Defendant argues the court should deny Plaintiff's Order to Show Cause because Plaintiff failed to engage in bona fide negotiations with Defendant prior to instituting the lawsuit. (Opposition Brief (“Opp. Brief”) at p. 7). Defendant contends Plaintiff ended negotiations while Defendant still wanted to negotiate in good faith. (Id. at p. 8). Defendant characterizes Plaintiff's offer as a “take it or leave it” offer, which does not constitute a bona fide negotiation. (Id. at p. 9). Defendant further contends she advised Plaintiff multiple times of her willingness to negotiate in good faith. (Id. at p. 10). Next, Defendant argues Plaintiff seeks the easements in bad faith and is manifestly abusing the power of eminent domain. (Id. at p. 11). Defendant

⁴ Defendant asserted lack of notice of this application to the court.

contends Plaintiff's claim that it needs the easements to perform ongoing maintenance and repairs on the Bridge is "extremely dubious." (Ibid.). Defendant contends that since the County did not easements to care for the old Bridge for eighty-seven (87) years, then it follows that County does not need easements to care for the reconstructed Bridge. (Opp. Brief at p. 11). Defendant then claims that the easements will negatively affect her ability to sell her property in the future. (Id. at p. 12).

Lastly, Defendant argues Plaintiff has shown bad faith in its dealings here, as it failed to adhere to its promise that the temporary easement it negotiated with Defendant would only run for six (6) months, and that it would not place any gabions or riprap on Defendant's property. (Ibid.). Defendant contends the use of riprap and gabions is arbitrary and unnecessary. (Id. at p. 13).

IV. Plaintiff's Reply

Plaintiff argues it properly engaged in bona fide negotiations with Defendant prior to instituting this lawsuit. (Reply Brief at p. 3). Plaintiff contends Defendant at no time made an invitation to Plaintiff to engage in further discussions about the offering price, supported by concrete and credible evidence of value. (Id. at p. 5). Furthermore, Plaintiff contends Defendant never provided credible information supporting her opinion that the offer was too low. (Ibid.). Next, Plaintiff argues it is entitled as a matter of law to exercise its power of eminent domain to acquire the easements at issue. (Id. at p. 7). Plaintiff contends any assertion by Defendant that Plaintiff failed to answer her inquiries regarding the purpose of the easements are false. (Id. at p. 8). Lastly, Plaintiff argues Defendant has shown no evidence that Plaintiff has acted in bad faith of in a fraudulent manner, or that it has manifestly abused the power of eminent domain. (Id. at p. 10).

V. Defendant's Sur-Reply

Defendant argues Plaintiff has been negotiating in bad faith because County Engineer Joseph Femia indicated that the County had determined it would need to acquire the permanent easements prior to the reconstruction of the Bridge, but Plaintiff promised Defendant that the easement would only run for six (6) months. (Sur-Reply Brief at p. 1). Defendant contends Femia's certification confirms that the County never intended to honor its agreement with Defendant. (Ibid.). Lastly, Defendant contends Femia's certification fails to explain why the easements are necessary now, after the Bridge had been in existence for eighty-seven (87) years without any easements. (Id. at p. 2).

VI. Analysis

1. Standard of Review

Pursuant to N.J.S.A. 20:3-8, a party shall institute the commencement of a condemnation action by filing a Verified Complaint and Demand Judgment that the condemnor is duly vested and has duly exercised its authority to acquire the property being condemned. A condemnation matter is brought by way of order to show cause, and the court may dispose of the action in a summary manner under R. 4:67.

2. The Condemnation Action

Eminent domain involves the taking of private property and is the subject of constitutional limits. Town of Kearny v. City of Old Bridge, Inc., 205 N.J. 386, 399 (2011). The eminent domain clause of the New Jersey Constitution states:

[p]rivate property shall not be taken for public use without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners.

N.J. Const. art. I, ¶ 20. The right to take private property for public use is of ancient origin, and is an inherent and necessary right of the sovereignty of the state. See Valentine v. Lamont, 13 N.J. 569, 575 (1953); National Docks R.R. Co. v. Central R.R. Co., 32 N.J. Eq. 755, 763 (E. & A. 1880). The condemnation process involves the exercise of one of the most awesome powers of government. City of Atlantic City v. Cynwyd Inv., 148 N.J. 55, 73 (1997). When a condemnor determines to acquire property pursuant to law, but cannot acquire possession by agreement with the prospective condemnee, all matters thereto and arising therefrom shall be governed by the Eminent Domain Act (the “Act”). See N.J.S.A. 20:30-6. Furthermore, the act provides that “no action to condemn shall be instituted unless the condemnor is unable to acquire such title or possession through bona fide negotiations with the prospective condemnee, which negotiations shall include an offer in writing by the condemnor to the prospective condemnee.” Ibid. The obligations of a condemnor under the Act “must be construed in a manner protective of property owners.” Kearny, supra, 205 N.J. at 430.

a. *Bona Fide Negotiations*

The first issue here is whether Plaintiff satisfied its obligation to engage in bona fide negotiations with Defendant prior to instituting this condemnation action. The court finds that it did. The Act does not define what is necessary to make a negotiation bona fide. See id. at 409. Consistent with the concern for fairness to the property owner, courts have strictly construed the Act’s requirement of bona fide negotiations. State by Comm’r of Transp. v. Carroll, 123 N.J. 308, 317 (1991). Failure to conduct the requisite negotiations will result in a dismissal of the condemnation complaint. See id. at 316. In the recent decision of Borough of Merchantville v. Malik & Son, LLC, the New Jersey Supreme Court considered whether a condemning authority

had engaged in bona fide negotiations with a property owner prior to commencing a condemnation suit. See 218 N.J. 556 (2014).

In Malik & Son, the condemning authority, the Borough of Merchantville, sent a letter to the property owner with a written offer of compensation for the taking. Id. at 562. The letter explained that the offer reflected pre-renovation fair market value of the property, enclosed the appraisal, and informed the property owner that it would assume the property owner did not accept the offer and did not wish to proceed with further negotiations if he did not respond within seventeen (17) days. Ibid. Within twelve (12) days of the borough's letter, the property owner sent a response letter stating that the offer was far less than he could accept and that his letter should serve as a formal rejection of the original offer, but that he was still open to further discussion about more reasonable compensation. Ibid. Then, twelve (12) days after the property owner sent his response letter, the borough instituted a condemnation action by filing a declaration of taking and verified complaint. Id. at 563.

The Supreme Court held that “the condemning authority may have an obligation to continue to discuss the offering price when the response provides credible information supporting its opinion that the offer is too low,” but “the condemning authority's duty to negotiate can be tempered by a property owner's failure to cooperate.” Id. at 572–73. Although the duty to negotiate does not cease simply because the parties takes widely disparate positions on the value of the property, “the condemning authority has no obligation to continue to negotiate if the other party refuses to do so.” Malik & Son, LLC, supra, 218 N.J. at 573. Furthermore, the condemning authority must respond to an invitation to engage in further discussions about the offering price as long as the property owner supports that invitation with concrete and credible evidence of value. Id. at 575.

The facts here are similar to those in Malik & Son. First, on July 9, 2014, Plaintiff's counsel requested invoices from Defendant for purported repairs made on her home after vibrations from the reconstruction caused damages after Defendant had mentioned the cost of the repairs to Plaintiff's appraiser. On July 22, 2014, Defendant produced the invoices, which showed she spent \$2,287.79 on repairs to her home. Plaintiff's counsel then sent Defendant a letter on August 28, 2014, offering Defendant \$8,287.79, and attaching Plaintiff's approved appraisal of the property to be taken. Plaintiff also explained that the \$8,287.79 number represented the appraised value of the property to be taken (\$6,000.00) plus the cost of the repairs Defendant had to make to her home (\$2,287.79). To end the letter, Plaintiff requested any additional information Defendant wished to provide concerning just compensation for the easements, and advised Defendant that she had fourteen (14) days to respond or Plaintiff would assume that Defendant rejected the offer.

Defendant responded on September 8, 2014, requesting the opportunity to hire an independent appraiser, stating that the original offer does not account for a number of alleged wrongdoings on Plaintiff's behalf (severe inconvenience, distress, the destruction of two (2) trees of sentimental value), and requesting an explanation for the need of the easements. Plaintiff responded to Defendant's letter on October 29, 2014, and explained that the easement was necessary to maintain the structural stability of the bridge, which involves periodic inspections and the ability to perform appropriate maintenance and repair work in the future. Plaintiff again gave Defendant (14) days to respond. Defendant responded by claiming Plaintiff had failed to answer her inquiries, and stated that she would be in no position to respond to Plaintiff's offer until Plaintiff answered her inquiries. On November 19, 2014, Plaintiff again offered its explanation of the necessity of the easements, and advised Defendant that Plaintiff intended to

initiate a condemnation action at that time. Defendant made her last response on November 20, 2014, maintaining her position that Plaintiff had not answered her inquiries, and reserving her right to retain her own appraiser. Plaintiff did not file the condemnation action until January 22, 2015.

The court is entirely satisfied that Plaintiff entered into and maintained bona fide negotiations with Defendant regarding just compensation for the taking of the Easement Property. First, Plaintiff added Defendant's out of pocket repair costs to the amount of the offer after Defendant provided an invoice of the costs. Defendant did not provide any concrete or credible evidence of value for any of the other alleged depreciations of value to her property, or her claims of distress or severe inconvenience. Second, Defendant refused to accept Plaintiff's explanation of the necessity of the easements, even though Plaintiff offered Defendant the explanation multiple times. Plaintiff directly responded to Defendant's inquiries; whether Plaintiff's response was the one Defendant wanted or not does not change the fact that Plaintiff proffered a rational, competent response. Third, Defendant was the party who effectively ended the negotiations. Defendant stated she could not respond to the offer until she received an explanation for the necessity of the easements, after Plaintiff had already provided same. Plaintiff had no duty to continue to pursue negotiations that were going nowhere due to Defendant's failure to cooperate.

Furthermore, Defendant has never to this day retained her own appraisal to counter Plaintiff's offer. Defendant has the right to retain her own appraiser, but she does not have the right to enjoin Plaintiff from initiating a condemnation action indefinitely while she contemplates getting an independent appraisal. Defendant first mentioned her intention to hire an independent appraiser on September 8, 2014, and was still mentioning her right to hire one on November 20,

2014. As of the date of the filing of this application, there is no evidence that Defendant has hired an independent appraiser. Thus, the court finds that Plaintiff was not bound to wait indefinitely for Defendant to hire an appraiser. Lastly, Plaintiff waited two (2) months from its last communication with Defendant before initiating this action. The condemnor in Malik & Son only waited twelve (12) days from the last communication before filing the action, and had much less of a discussion between the parties, yet the Supreme Court found that the condemnor satisfied its obligation to engage in bona fide negotiations. As such, the court finds that Plaintiff engaged in bona fide negotiations with Defendant in satisfaction of N.J.S.A. 20:30-6.

It appears plain that the property owner has refused to negotiate **at all** over fair compensation, but rather sought to negotiate solely over whether, and to what extent, the easements and attendant improvements were really necessary. The condemnor more than once offered competent, rational explanations for the nature and extent of the condemnation and attendant improvements, while the property owner offered, and offers, no competent counter-vailing evidence.

At oral argument, Defendant claimed the County never responded to her demands for compensation for the following ancillary damages, as set forth in Defendant's counsel's September 8, 2014 letter: litter on Defendant's property; deprivation of Defendant's full use and enjoyment of her property; removal of a fence; disturbance of landscaping; destruction of the bucolic nature of the property; trespass; and removal of two trees of sentimental value to Defendant. But, the County did respond in its letter dated October 29, 2014, in which the County stood by its original offer of \$8,287.79, and in none of the subsequent correspondence between the parties did Defendant ever raise the issue of compensation for the above ancillary damages again. As oral argument made plain, the property owner had and has no intention to

negotiate over price because she does not accept the proposition that the easements shall ever exist.

b. *Bad Faith and Arbitrariness of the Taking*

The next issue is whether the Plaintiff acted in bad faith in instituting this condemnation action, or whether this condemnation action is arbitrary. The court holds Plaintiff did not bring this condemnation action in bad faith, nor was this action arbitrary or unnecessary.

Generally, when a municipality exercises its power of eminent domain, the courts presume that determination is valid, and give that determination great deference. See Taxpayers Assn. of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249, 264 (1976); see also Riggs v. Long Beach Twp., 109 N.J. 601, 613 (1988) (explaining that courts generally do not inquire into a public body's motive concerning the necessity of a taking for public use). Indeed, the reviewing court will not upset a municipality's exercise of eminent domain "in the absence of an affirmative showing of fraud, bad faith or manifest abuse." Twp. of W. Orange v. 769 Assocs., 172 N.J. 564, 572 (2002); see also Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 337 (1995) (stating the court shall not enforce a decision to condemn when there is a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain."). Bad faith is "the doing of an act for a dishonest purpose." Twp. of Reddington v. Solberg Aviation, 409 N.J. Super. 282, 310–11 (App. Div. 2009). Furthermore, a municipality acts in bad faith if the condemnation is arbitrary. Id. at 323. If the court determines that the property owner has made a prima facie showing of arbitrariness, then the municipality must prove that the condemnation is reasonable and necessary. Ibid. The party claiming that a municipality acted in bad faith has the burden of proving such bad faith by clear and convincing evidence. Id. at 311.

The court finds no showing of fraud, bad faith, manifest abuse, or dishonesty in Plaintiff's decision to exercise its eminent domain power. The court has already determined above that Plaintiff engaged in bona fide negotiations with Defendant in trying to reach a mutual agreement on just compensation for the takings. Thus, the court is satisfied Plaintiff has not acted in bad faith in its institution and litigation of this condemnation action. The court is similarly satisfied that the proposed takings here are not arbitrary. First, Defendant fails to make a prima facie showing of arbitrariness. Indeed, apart from bare assertions that the easements are unnecessary, Defendant offers no evidence of bad faith, manifest abuse, or arbitrariness in this action. Nonetheless, Plaintiff rationally explains the easements are necessary in order to allow the County to perform required maintenance on the structure of the Bridge, as well as the slope and grading. Furthermore, the easements will allow the County and State to access the property in order to perform mandatory periodic inspections. Plaintiff offers a certification from the County Engineer, Joseph Femia, in support of its explanation for the necessity of the easements. No competent countervailing evidence is in the record.

Defendant's argument seems to stem from the issue of whether there was an agreement between the County and Defendant for a temporary easement at the time the County undertook the reconstruction of the Bridge, and whether the County breached that alleged agreement by failing to adhere to the terms of the temporary easement. Those issues, however, are irrelevant to this application. The issues here center on the County's use of its eminent domain power to condemn certain property for the use of three (3) permanent easements. Plaintiff has shown it has the right to condemn. Plaintiff has shown that it engaged in bona fide negotiations and offered just compensation to Defendant for the condemnation. Lastly, Plaintiff offered a valid explanation justifying the necessity and reasonableness of the permanent easements, and

Defendant offered no contrary evidence refuting Plaintiff's explanation. As Defendant fails to meet her burden of proving bad faith, the court finds that the condemnation action is proper.

VII. Conclusion

For the foregoing reasons, Plaintiff's Order to Show Cause is Granted.

An Order accompanies this decision.

Sincerely yours,

Robert P. Contillo, P.J.Ch.

RPC:mgm
Enclosure