

NOT TO BE PUBLISHED WITHOUT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

Township of Lakewood,

Plaintiff,

v.

Home Guardian Co., E/O Maximillian
Hirschberg, International Tracers of
America, Barbara Sonson, Unknown
Owners

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-3689-14

CIVIL ACTION

OPINION

AND

Township of Lakewood,

Plaintiff,

v.

Alexander Falk, Hyman Kaufman,
Jacob H. Suffin, Maximillian
Hirschberg, Stephen Sonson,
Unknown Owners

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-3690-14

CIVIL ACTION

OPINION

AND

Township of Lakewood,

Plaintiff,

v.

Florence Steinau, Leslie Steinau, Jr.,
International Tracers of America,
Tracers of America, Inc., Maximillian
Hirschberg, Stephen Sonson, Barbara
Sonson, , Unknown Owners

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-3691-14

CIVIL ACTION

OPINION

AND

Township of Lakewood,

Plaintiff,

v.

Home Guardian Co., E/O Maximillian
Hirschberg, Stephen Sonson,
Unknown Owners

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN-L-3692-14

CIVIL ACTION

OPINION

Argued: May 29, 2015

Decided: June 1, 2015

Vincent J. Grasso, A.J.S.C.

Pamela M. Snyder, Esq. appearing on behalf of the plaintiff, Township of Lakewood (Bathgate,
Wegener & Wolf, P.C.)

Kenneth A. Garzo, *pro se*

Summary

The matter before the court involves four condemnation actions brought by plaintiff, Township of Lakewood (Township), in a summary manner pursuant to R. 4:67 in order to establish that the Township has duly exercised its authority to acquire the subject properties being condemned and for the appointment of three commissioners in accordance with N.J.S.A. 20:3-1 to -50, as well as the fixing of compensation to be paid for the taking of the interest in the subject land and premises in accordance with N.J.S.A. 20:3-12. Following the institution of these condemnation proceedings, Kenneth Garzo, *pro se*, who had not been named as a party defendant in these condemnation matters, filed a notice of motion for summary judgment, which, in relevant part, asserts that the Township has failed to comply with the statutory requirements of N.J.S.A. 20:3-6 of the Eminent Domain Act of 1971.

Plaintiff, Township, filed opposition to Garzo's summary judgment motion as well as a motion for leave to file an amended verified complaint and name as parties, Kenneth Garzo and other heirs of the estate of Florence Teri Steinau, along with the State of New Jersey, which may have an interest or lien against the subject properties for unpaid New Jersey State Inheritance Tax under New Jersey Estate Tax.

At the time the Township instituted these condemnation actions on December 5, 2014, it did not name Kenneth Garzo as a party defendant who has now asserted that he has title to the subject properties by virtue of an omnibus deed recorded with the Ocean County Clerk on October 7, 2014. As a result, there were no *bona fide* negotiations between Garzo and the Township prior to the institution of the condemnation action. At issue is whether the *bona fide* negotiation requirement pursuant to N.J.S.A. 20:3-6 may now be dispensed by the court under

the circumstances and given the fact that Garzo has been and continues to be a resident of the State of California at the time these condemnation proceedings were instituted.

Background

The following facts are not in dispute. The Township was created pursuant to N.J.S.A. 40A:63-1 to -9 and is authorized by N.J.S.A. 40A:12-1 to -38 to acquire lands and property rights by purchase, or by the exercise of eminent domain under N.J.S.A. 20:3-1 to -50. Pursuant to N.J.S.A. 40A:12-1 to -38, the Township designated two areas for redevelopment, of which the subject properties are a part. The Township has determined that it is necessary to acquire a fee simple interest in the subject properties for public use and redevelopment. The subject properties comprise all the land and premises referred in the four condemnation actions. Kenneth Garzo, is the current owner of the subject properties and resides in the State of California.

Relying on the Township tax rolls, the Township initially believed that it had owned the subject properties for more than forty years by way of a foreclosure judgment issued in 1973. Upon its review of the recorded deeds through a title search, the Township discovered the names of different owners of the properties. The Township states that it did not engage in *bona fide* negotiations with any of them because they are out-of-state residents. In July 2014, the Township Committee adopted an ordinance authorizing the Township to undertake condemnation proceedings pursuant to N.J.S.A. 20:3-1 to -50, including the obtaining of appraisals, the commencement of *bona fide* negotiations, and the commencement of eminent domain proceedings.

In August 2014, the Township retained Sam Levi of Starmark appraisals to conduct appraisals of the subject properties. On September 1, 2014, Levi prepared reports with a valuation and finalized the reports on October 1, 2014. On December 5, 2014, the Township

filed its condemnation actions by way of verified complaint and order to show cause. The Township admitted that at that time, it inadvertently overlooked Garzo's omnibus deed recorded on October 7, 2014. Therefore, before filing the complaints, the Township did not engage in any communication or negotiation with Garzo, nor gave him notice of the appraisals or provided Garzo offers in writing as required under N.J.S.A. 20:3-6.

According to a proposed ordinance by the Township, in 1951, Maximillian W. Hirschberg, a land developer, acquired title to the subject properties by a deed from Home Guardian Company of New York. He died in 1958 and left his wife, Florence Teri Steinau, the residuary of his estate, including the subject properties. Thereafter, Florence Teri Steinau passed away and left the residuary of her estate, including the subject properties, to her surviving siblings, Robert Kairalla, Marie Ayd, Beverly Cox, and Renee Hamil, and her nephew, Kenneth Garzo, in equal shares. The deed from the estate of Florence Teri Steinau is dated August 28, 2014, but was not recorded until October 7, 2014, which was six days after the appraisal reports were finalized. Nevertheless, there is no recorded deed showing transfer of the subject properties from the estate of Maximillian Hirshberg to Florence Teri Steinau and no ancillary probate proceedings filed regarding the properties owned by Maximillian Hirshberg. The defendant property owners were not listed on the tax rolls for more than forty years and property taxes were not paid for more than forty years.

On March 10, 2015, Garzo filed motions for summary judgment. The Township then conducted a further deed review and recognized Garzo's property interest. On April 7, 2015, plaintiff moved to amend its complaints by listing Garzo on its declarations of taking, along with the State of New Jersey and other heirs of the estate of Florence Teri Steinau. Plaintiff also

asserted that it attempted to negotiate a global settlement with Garzo, but to date, those negotiations have not been successful.

On May 13, 2015, the Township provided Garzo a copy of a proposed ordinance regarding the subject properties, which passed first reading on April 30, 2015. The ordinance states that it authorizes the settlement of Garzo's claim to ownership of certain township owned real properties. Garzo has expressed his willingness to negotiate with the Township based on the terms outlined in this new ordinance. Among other things, the ordinance states that the Township was advised that its title to the subject properties may be faulty and incomplete and the process to defend its title would be a lengthy and expensive process with no guarantee of total success. Moreover, the ordinance mentions that Garzo has offered by way of settlement to release his claim and deed in exchange for the Township deeding to him certain properties within the Township and the Township desires the settlement of the claim to avoid lengthy and costly litigation.

Findings

Summary Judgment Standard

New Jersey Court Rule 4:46-2 sets forth the standard for summary judgment. Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” R. 4:46-2. The role of the motion judge is to determine whether there is a genuine issue of material fact for trial or whether the evidence, viewed in the light most favorable to the non-moving party, is so one-sided that one party must prevail as a matter of law. Brill v.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–52 (1986)).

To avoid summary judgment, the non-moving party must clearly establish an issue of material fact. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). To do so, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. R. 4:46-5(a). It has also been noted that “[c]onclusory assertions, unsupported by specific facts, presented in affidavits opposing the motion for summary judgment are likewise insufficient to defeat a proper motion for summary judgment.” Sch. Alliance Ins. Fund v. Fama Const. Co., 353 N.J. Super. 131, 136 (Law Div. 2001) (citing Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 888 (1990)).

Summary judgment obviates futile trials by allowing courts to pierce the pleadings to see whether a genuine dispute exists. Judson, supra, 17 N.J. at 75–76 (citations omitted). Nevertheless, it must not deprive deserving litigants of their right to a trial. Judson, supra, 17 N.J. at 77. Accordingly, the court may grant a summary judgment only if: (1) no genuine issue of material fact exists; and (2) the movant is entitled to judgment as a matter of law. R. 4:46-2(c).
N.J.S.A. 20:3-6

Garzo claims that N.J.S.A. 20:3-6 requires the Township get the court’s permission to dispense with the necessity of negotiation before it skips the negotiation requirement and institutes the action to condemn the properties. Garzo asks the court to dismiss the Township’s complaint and require the Township recommence its condemnation proceedings. Garzo also argues that the Township failed to provide him an opportunity to accompany the appraiser during

the inspection of the properties and make an offer in writing to him before filing the condemnation complaint.

The Township responds that N.J.S.A. 20:3-6 does not require the Township to first make an application to the court to dispense with the *bona fide* negotiation requirement, but rather permits the court to waive the negotiation requirement when ruling on the Township's order to show cause if the holder of title is unknown, resides out of state, or for other good cause. Additionally, the Township refers to the Report of the Eminent Domain Revision Commission that "upon a disclosure of those facts to the court, negotiations may be omitted." Plaintiff requests that the court deny Garzo's motion for summary judgment and enter judgment appointing three (3) commissioners, as well as grant it leave to amend its pleadings to join additional property interest holders.

N.J.S.A. 20:3-6 prescribes the jurisdictional requirements for filing a condemnation complaint by setting forth the pre-litigation procedure as follows:

Whenever any condemnor shall have determined to acquire property pursuant to law, including public property already devoted to public purpose, but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause, the condemnation of such property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom shall be governed, ascertained and paid by and in the manner provided by this act; provided, however, 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 holding the title of record to the property being condemned, setting forth the property and interest therein to be acquired, the compensation offered to be paid and a reasonable disclosure of the manner in which the amount of such offered compensation has been calculated, and such other matters as may be required by the rules. Prior to such offer the taking agency shall appraise said property and the owner shall be given an opportunity to accompany the appraiser during inspection of the property. Such offer shall be served by certified mail. In no event shall such offer be less than the taking agency's approved appraisal of the fair market value of such property. A rejection of said offer or failure to accept the same within the

period fixed in written offer, which shall in no case be less than 14 days from the mailing of the offer, shall be conclusive proof of the inability of the condemnor to acquire the property or possession thereof through negotiations. *When the holder of the title is unknown, resides out of the State, or for other good cause, the court may dispense with the necessity of such negotiations.* Neither the offer nor the refusal thereof shall be evidential in the determination of compensation.

[N.J.S.A. 20:3-6 (emphasis added).]

The word of “may” reflects that a court is vested with discretion as to whether it dispenses with the necessity of such negotiations under the listed circumstances. In other words, the owner’s residence out of the State does not necessarily authorize the condemnor to dispense with the negotiation requirement.

In City of Passaic v. Shennett, 390 N.J. Super. 475 (App. Div. 2007), the Appellate Division held:

“[T]he purpose of the Legislature in enacting N.J.S.A. 20:3-6 was, as stated by the Eminent Domain Revision Commission, to *encourage entities with condemnation powers to make acquisitions without litigation.* Such a procedure thereby saves both the acquiring entity and the condemnee the expenses and delay of litigation. It permits the landowner to receive and keep full compensation. *This purpose is furthered by strict construction of N.J.S.A. 20:3-6.* If a condemnor may ignore the statute and later cure the proceedings, the purpose of N.J.S.A. 20:3-6 will be completely frustrated. Indeed, an order for a stay so that a condemnor may then do what it should have done earlier will encourage noncompliance with N.J.S.A. 20:3-6. A condemnor will know that if it does not comply, it may nevertheless proceed.

[Passaic, supra, 390 N.J. Super. at 482 (quoting Rockaway v. Donofrio, 186 N.J. Super. 344, 353–54 (App. Div. 1982)) (emphasis added).]

The court also emphasized that “[i]n exercising their powers of eminent domain, government entities must strictly comply with the rules and statutes governing condemnation.” Passaic, supra, 390 N.J. Super. at 486.

In light of the statute and the well-established case law, the court declines to exercise its discretion and dispense with the negotiation requirement pursuant to N.J.S.A. 20:3-6 by the mere fact of Garzo residing out of state. First, had the Township conducted a diligent and proper run-

down of title search to ensure that no intervening interest to the subject properties occurred prior to the filing of the complaint on Dec. 5, 2014, it would have discovered Garzo's omnibus deed recorded on Oct. 7, 2014. The Township admitted that it inadvertently overlooked Garzo's recorded deed prior to its filing of the complaint. Due to the Township's failure in verifying and confirming the owners of the properties but relying on the tax rolls, the Township failed to undertake the required *bona fide* negotiation with the record owners of the subject properties. Although Garzo resides in California, he has expressed his willingness to negotiate. All these factors militate in favor of not dispensing with the negotiation requirement, because the purpose of the statute is to encourage condemnor to make acquisition through negotiation to save both the condemnor and condemnee the expenses and delay of the litigation. Because a court must strictly construe N.J.S.A. 20:3-6 to further the purpose of the statute and allowing cure after non-compliance will frustrate such purpose, the court elects not to dispense with the necessity of negotiation and finds that the appropriate relief under the circumstances is to allow the Township remedy its procedural defects by clearing the title issue and engaging in the necessary negotiation with Garzo before instituting a condemnation action.

“Compliance with the prelitigation requirements of the statute [N.J.S.A. 20:3-6] is jurisdictional, and failure of the condemnor to comply with [them] will result in dismissal of the complaint.” Passaic, supra, 390 N.J. Super. at 482. Because the negotiation requirement is not dispensed with and the Township failed to negotiate with Garzo before filing the complaint, the court must dismiss the complaint. Moreover, the Township will suffer no harm by the dismissal without prejudice because it can re-file the complaint with correct parties if the negotiation is not fruitful.

For the reasons set forth herein, the court grants the title owner Garzo's summary judgment by dismissing plaintiff's complaint without prejudice. The court denies plaintiff's motion to amend the complaint. The parties should proceed in accordance with N.J.S.A. 20:3-6 and other provisions of the Eminent Domain Act. Ms. Snyder is to prepare the order that comports with the court's ruling.