

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

**FILED AND  
ENTERED ON  
DATE**  
  
**ROCKLAND  
COUNTY CLERK**

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In the Matter of the Application of

THE VILLAGE OF HAVERSTRAW TO ACQUIRE  
TITLE TO CERTAIN REAL PROPERTY LOCATED  
IN THE VILLAGE OF HAVERSTRAW, ROCKLAND  
COUNTY, STATE OF NEW YORK, AND  
DESIGNATED ON THE TAX MAPS OF THE  
VILLAGE OF HAVERSTRAW AS SECTION 27.18,  
BLOCK 1, LOT 1.

Index No: 6169/03

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**DECISION & ORDER**

AAA ELECTRICIANS, INC.,

Claimant,

**-against-**

VILLAGE OF HAVERSTRAW,

Condemnor.

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DICKERSON, J.

**EMINENT DOMAIN: ADVANCE PAYMENTS AND INTEREST RATES NO: 2**

In this latest exploration<sup>1</sup> of the scope of advance payments and interest rates, this Court must decide whether a condemnor may make an offer of \$3,480,000 to a condemnee pursuant to Eminent Domain Procedure Law [ " E.D.P.L. " ] § 303, have it accepted and then withdraw the offer and replace it with a revised offer

reducing the amount to \$2,596,150 " to reflect correction of error or miscalculation " [ E.D.P.L. § 304(F)]. Stated, simply, the condemnor may revise and reduce its offer [ which the condemnee accepted protesting only the offered interest of 4% ] when the first offer was based upon " error or miscalculation " which is evident herein. In addition, the Court finds that a reasonable and appropriate interest rate on the revised advance payment would be 6% per annum.

#### **FACTUAL BACKGROUND**

The Claimant, AAA Electricians, Inc., seeks an order directing the Condemnor, the Village of Haverstraw [ " the Village " ], to tender to the Claimant " the remaining balance of the required Advance Payment based upon the Village's highest and best appraisal of the property at issue of \$3,480,000.00, with interest in the amount of six (6%) percent per annum from the date of title vesting to the date of payment "2.

#### **The Waterfront Redevelopment Project**

The Claimant formerly owned real property known as Section 27.18, Block 1, Lot 1 on the Tax Map of the Village of Haverstraw, New York [ " the subject premises " ]. Title to the subject

premises vested in the Condemnor on or about November 14, 2003, pursuant to eminent domain proceedings instituted for the Downtown Waterfront Redevelopment Project in the Village of Haverstraw.

### **The First Offer**

In accordance with Eminent Domain Procedure Law ["E.D.P.L."] § 303, the Condemnor made a formal offer to the Claimant in the amount of \$3,450,000 based on the Village's highest approved appraisal<sup>3</sup> which offer was accepted by the Claimant as an Advance Payment<sup>4</sup>.

### **The Revised Offer**

Subsequently, the Village advised the Claimant that " it has come to the Village's attention that there were certain errors made with respect to the establishment of the amount of that offer. Specifically, the appraisers for the Village failed to consider the cost to clear the site of extensive concrete pads and foundations, concrete pipes, concrete catch basins, process concrete and miscellaneous debris including steel and tires. In addition, an environmental review disclosed that there are contaminants on the site that require special treatment. Due to the extensive nature of these site problems, they directly affect the fair market value

of the site. Therefore, the Village's original offer of \$3,450,000 is hereby withdrawn "<sup>5</sup>. The Village informed Claimant that it was reducing the offer. " After taking into consideration the appraisals prepared on behalf of the Village, as adjusted to reflect the significant costs to clear the site as noted above, the Village hereby offers to tender payment to AAA Electricians, Inc. with regard to acquisition of the fee title to the above referenced property for the sum of \$2,596,150 "<sup>6</sup>.

### **The Motion**

On March 1, 2004, the Claimant filed a motion before Justice Peter P. Rosato seeking an order requiring the Village to disclose its environmental reports, requesting the Court's *in camera* review of the Village's appraisal, and for an order directing the Village to revise its advance payment agreement, claiming that the Village reduced its offer in bad faith.

### **The Decision: E.D.P.L. § 304(F)**

In his May 14, 2004 decision, Justice Rosato denied the Claimant's requests, holding that " the mere fact, in and of itself, that the Village downwardly revised and reduced its original offer cannot be said to constitute bad faith "<sup>7</sup>. Justice

Rosato relied on E.D.P.L. § 304(F) which provides that " at any time subsequent to making the written offer, the amount of such offer may be adjusted or revised by the condemnor to reflect correction of error or miscalculation."

#### **The New Offer Accepted Under Protest As To Interest Only**

By letter dated July 28, 2004, the Claimant accepted the Village's revised offer of \$2,596,150 stating that " we are collecting the award under protest because we disagree with your interest figures and are reserving our right on this issue "<sup>8</sup>.

#### **The Motion To Renew And/Or Reargue**

On September 8, 2004, the Claimant filed a motion before Justice Rosato to renew and/or reargue, again seeking production of the Village's environmental reports, the Court's *in camera* review of the Village's appraisal and directing that the Village pay interest on the Advance Payment at a rate of 6% per annum. In his January 25, 2005 Decision and Order, Justice Rosato ordered the Village to disclose its September 2000 Phase I and Phase II Environmental Site Assessment Report which was prepared by Ecosystem Strategies Incorporated, denied Claimant's request for an *in camera* review of the Village's appraisal, and declined to

determine the issue of whether the Village was required to pay interest at a rate of 6% on the grounds that such was not within the scope of the Claimant's motion to reargue<sup>9</sup>.

#### **Reduction Of The Advance Payment Offer: The Claimant's View**

It is the Claimant's view that " none of the Village's purported explanations serve as a sufficient basis upon which to reduce the Advance Payment "<sup>10</sup>. The Claimant contends that the environmental report relied upon by the Village " reveals no such ' site problems ' "<sup>11</sup>, relying on the report's " Conclusions and Recommendations " which state that " no environmental remediation is required "<sup>12</sup>. The Claimant states that the environmental report recommends that certain debris be cleaned up, and states that " none of these debris materials were judged by this office to pose a threat to the environmental integrity of the subject property."<sup>13</sup> The Claimant states that the environmental report was independently confirmed by the environmental firm of Groundwater Investigations, Inc.<sup>14</sup>

#### **Estimated Clean-Up Costs**

The Claimant contends that the estimated clean-up costs for the removal and disposal of the debris would cost, approximately,

\$35,000-\$45,000<sup>15</sup>. The Claimant insists that " even if such clean-up costs are chargeable to the Claimant ( and they are not ), the Village has offered no substantiation or evidence justifying why the remaining \$808,000 was deducted."<sup>16</sup>

It is the Claimant's position that since the value to be paid by the Condemnor is the fair market value of the property at the time of the taking, based upon the property's highest and best use [ See e.g., Matter of Town of Islip, 49 N.Y. 2d 354, 426 N.Y.S. 2d 220 ( 1980 )], and " the Village has already assessed the fair market value of the condemned property at \$3,480,000...it cannot not deduct the Advance Payment for the removal of miscellaneous debris which does not affect the property's fair market value."<sup>17</sup>

### **Environmental Contaminants**

Relying on Matter of the City of New York v. Mobil Oil, 12 A.D. 2d 77, 783 N.Y.S. 2d 75 ( 2d Dept. 2004 ), and Northville Industries Corp. v. The State of New York, 14 A.D. 3d 817, 788 N.Y.S. 2d 464 ( 3d Dept. 2005 ), the Claimant contends that the presence of any environmental contaminants on the site would not change the amount of the advance payment offer in any event since " the amount of just compensation due a condemnee may not be reduced by the alleged cost of remediation."<sup>18</sup>

### Condition of Property Was Known

The Claimant states that at the time the initial Advance Payment offer was made, the Village was aware of the information it relied upon to reduce the Advance Payment. In support of this position, the Claimant insists that the condition of the subject property was "thoroughly described in the Village's September 2000 Environmental Site Assessment Report" as prepared by Ecosystems Strategies, Inc.<sup>19</sup>

Hence, the Claimant contends that the Village's assertions that it was not aware of the site problems when it made its initial Advance Payment offer "was not in good faith and was violative of the policy of the EDPL as set forth in §301...The sudden realization of 'errors made with respect to the establishment of the amount of that offer' is mere gamesmanship on the part of the Condemnor and its withdrawal of the original offer is improper and in bad faith"<sup>20</sup>.

### The Village's Position - Issue Previously Decided

The Village contends that the Claimant previously argued before Justice Rosato that the Condemnor should not have been allowed to revise the Advance Payment offer, that the basis for the revision was in bad faith, and that the Condemnor should have to

produce documents to support their revision. The Village states that Justice Rosato held that " the Village had the right under the EDPL to revise its offer, that ' the mere fact, in and of itself, that the Village downwardly revised and reduced its original offer cannot be said to constitute bad faith ', and that the Condemnor did not have to produce its appraisal report "<sup>21</sup>.

Hence, The Village states that the advance payment was properly based on the revised offer and " Mr. Rikon should not be permitted to again argue that the advance payment should have been in the amount of the Village's original offer."<sup>22</sup>

#### **Village Was Unaware Of Property's Condition**

The Village contends that only after the original Advance Payment offer was made, did it learn that " there were substantial structural elements, including extensive concrete pads and foundations, concrete pipes, concrete catch basins, process cement and miscellaneous debris, including steel, empty 55 gallon drums and tires, on the property, and certain environmental issues with respect to the subject property "<sup>23</sup>. In addition, " The detailed cost estimates for removal of the various structural elements on the subject property, and for remediation of the environmental issues, were not finalized until the end of October and mid-November, 2003, respectively...As a consequence, they could not

have been taken into consideration at the time the formal offer was made by this office by letter dated August 22, 2003, two months earlier."<sup>24</sup>

According to the Village, these cost estimates resulted in an estimated cost in excess of \$850,000 to remove all the material on the site and deal with the environmental issues. Upon careful review of the appraisal prepared for the Village, the Condemnor learned from the appraiser that he had not considered the site material and environmental issues in reaching his conclusions of value, and that the opinion of value expressed in the appraisal should be reduced by these estimated costs.

As a consequence, pursuant to E.D.P.L. § 304(F), which provides for an adjustment in the formal offer " to reflect correction of error or miscalculation ", the Village adjusted the amount of the offer to reflect these costs.

#### **The Issue Of 6% Interest**

The Claimant objects to the Village's application of 4% interest to the advance payment tendered to the Claimant, insisting that there is a presumption that the statutory interest is the appropriate interest, and that the burden is upon the challenger to overcome this presumption. The Claimant states that the Village

has not presented proof necessary to show that it has sufficiently overcome the statutory presumption of 6% interest.

**General Municipal Law § 3(a)(2)**

It is the Village's position that since General Municipal Law [ " G.M.L. " ] § 3(a)(2) states that interest " shall not exceed six percent ", the payment of interest at a rate lower than six percent is not prohibited. In addition, the Village contends that since " caselaw clearly demonstrates that the rate of interest is a question to be determined by the court as part of the compensation trial, this issue should be left to be heard with the claim for additional compensation. " [ See e.g., MTA v. American Penn. Corp., 94 N.Y. 2d 154, 158, 676 N.Y.S. 2d 577 ( 1999 ) ( " The amount of interest necessary to bring the payment into accord with the constitutional requirement is a judicial question. " )].

**DISCUSSION**

**Law Of The Case**

The Claimant is asking this Court to render a decision on a matter upon which Justice Rosato has already ruled. In that

Court's May 14, 2004 decision, Justice Rosato held that " EDPL §304(F) expressly provides that...' at any time subsequent to making the written offer, the amount of such offer may be adjusted or revised by the condemnor to reflect correction of error or miscalculation '. This is precisely what occurred herein, and, thus, the mere fact, in and of itself, that the Village downwardly revised and reduced its original offer cannot be said to constitute bad faith."

Since the Claimant's instant Notice of Motion is based on the " same arguments and facts " the Claimant raised before Justice Rosato, and did not " demonstrate extraordinary circumstances warranting departure from the earlier determination on this issue ", Justice Rosato's decision is law of the case, and this Court is bound by it. [ See e.g., Quinn v. Hillside Development Corp., 21 A.D. 3d 406, 800 N.Y.S. 2d 206 ( 2d Dept. 2005 )].

#### **The Claimant Accepted The Advance Payment**

Inexplicably, the Claimant accepted the Village's revised Advance Payment offer without any objection to the reduced amount disagreeing only with the interest figures [ "...we are collecting the award under protest because we disagree with your interest figures and are reserving our right on this issue "<sup>25</sup> ]. This Court does not understand why the Claimant would accept the revised

Advance Payment offer, request that the checks be issued to it [ " Please issue the following checks for the advance fee award payment for our client, AAA Electricians, Inc. " <sup>26</sup> ] and then challenge the offer claiming that it was not made in good faith. There is no provision in the E.D.P.L. that permits a claimant to accept and receive the Advance Payment and then challenge the amount of that Advance Payment. The only procedure permitted in the E.D.P.L., once the Claimant had accepted and received the Advance Payment, is for the Claimant to file a claim for damages as a result of the acquisition. It is premature at this juncture for the Claimant to raise any objections to the Advance Payment that has already been accepted and received. The Claimant must now reserve for the just compensation trial any matters it wants this Court to consider [ See e.g., D'Onofrio v. The Village of Port Chester, 8 Misc. 3d. 1015(A), 2005 WL 1668403 ( West. Sup. 2005 ); Matter of the Village of Port Chester to Acquire Title to Certain Real Property Located in the Village of Port Chester, 5 Misc. 3d 1031(A), 2004 WL 2952860 ( West. Sup. 2004 )( " It is clear that condemnees may accept an advance payment without being forced to give up any rights they may have to seek greater compensation " )].

Accordingly, Claimant's motion regarding the issue of the Village's reduction of the initial Advance Payment offer is denied.

### The Interest Rate

E.D.P.L. § 304(A) requires that advance payments be made " with appropriate interest " [ See e.g., Matter of Town of North Hempstead, 70 Misc. 2d 350, 351, 333 N.Y.S. 2d 503 ( Nassau Sup. 1972 )( remainder of advance payments ordered to be paid with 6% interest ); Matter of Town of Hempstead, 78 Misc. 2d 1090, 359 N.Y.S. 2d 164 ( Nassau Sup. 1974 )( 6% interest on advance payments ); Matter of City of New York, 71 Misc. 2d 1019, 337 N.Y.S. 2d 753 ( N.Y.Sup. 1972 )( accrued interest at the legal rate on remainder of advance payment )]. G.M.L. § 3-a(2) provides that " The rate of interest to be paid upon any judgement or accrued claim...arising out of condemnation proceedings...shall not exceed six per centum per annum " .

### Presumptively Reasonable

The 6% interest rate in G.M.L. § 3-a(2) is presumptively reasonable. The Court, however, may in its discretion award interest at a lower rate upon the presentation of evidence sufficient to overcome the presumption [ See e.g. Rodriguez v. New York City Housing Authority, 91 N.Y. 2d 76, 78, 666 N.Y.S. 2d 1009 ( 1997 ); M.T.A. v. American Pen Corp., 94 N.Y. 2d 154, 701 N.Y.S. 2d 301 ( 1999 ); Abiele Contracting, Inc. V. New York City School

Construction Authority, 6 A.D. 2d 366, 367, 774 N.Y.S. 2d 380 ( 2d Dept. 2004 ); Auer v. State of New York, 283 A.D. 2d 122, 727 N.Y.S. 2d 507 ( 3d Dept. 2001 ); Matter of the Village of Port Chester to Acquire Title to Certain Real Property Located in the Village of Port Chester, 5 Misc. 3d 1031(A), 2004 WL 2952860 ( West. Sup. 2004 )].

### **Conclusion**

The Village has failed to overcome the presumption of reasonableness of the 6% interest rate mandated by G.M.L. § 3-a(2). As this Court held in Matter of the Village of Port Chester to Acquire Title to Certain Real Property Located in the Village of Portchester, supra, " Condemnation advance payments with appropriate interest serve a very different purpose than real property tax refunds arising out of tax certiorari proceedings. In condemnation proceedings the condemnee is being deprived of property which must be replaced as soon as possible ` so that he may be put in the same relative position...as if the taking had not occurred ` [ Rose v. State of New York, supra, at 24 N.Y. 2d 89 ]. The condemnee must be compensated ` for delay in making payment and deprivation of use of the property ` [ M.T.A. v. American Pen Corp., supra, at 94 N.Y. 2d 158 ]. And the condemnee must be given sufficient monies [ through advance payments and appropriate

interest ] so that ' He (may) now go into the market place (and) replace that which he has lost ' [ Matter of the Town of North Hempstead, supra, 70 Misc. 2d 352 ] and to enable him to do what is necessary to compensate him for his loss " [ City of New York (Stapleton Branch Library Addition), supra ]... The purpose of real property tax refunds, however, is to compensate taxpayers for paying more taxes than they should have, typically, several years ago. While such a windfall is welcome there is none of the urgency and, perhaps, even desperation, which condemnees face when their property is taken in a condemnation proceeding. This is why advance payments have been mandated, why advance payments should be paid sooner rather than later and why statutory interest of 6% should be imposed."

Accordingly, the Claimant's motion is granted to the extent that Claimant is entitled to interest in the amount of six (6%) percent per annum on the revised Advance Payment amount, from the date of title vesting to the date of payment. The motion is denied in all other respects.

This constitutes the Decision and Order of this court.

Dated: White Plains, N.Y.  
October 24, 2005

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HON. THOMAS A. DICKERSON  
JUSTICE SUPREME COURT

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## ENDNOTES

1. See Matter of the Village of Port Chester to Acquire Title to Certain Real Property Located in the Village of Port Chester, 5 Misc. 3d 1031(A), 2004 WL 2952860 ( West. Sup. 2004 )].

2. Attorney's Affirmation of Michael Rikon dated June 21, 2005 [ " Rikon Aff. " ] at pp. 1-2.

3. Rikon Aff. at Ex. B.

4. Rikon Aff. at Ex. C.

5. Rikon Aff. at Ex. D.

6. Rikon Aff. at Ex. D.

7. Rikon Aff. at Ex. D.

8. Affirmation in Opposition of John E. Watkins, Jr. dated July 13, 2005 [ " Watkins Aff. " ] at Ex. A.

9. Rikon Aff. at Ex. G.

10. Rikon Aff. at para. 15.

11. Rikon Aff. at para. 16.

12. Rikon Aff. at para. 17.

13. Rikon Aff. at para. 17, Ex. H, Phase I - Phase II Environmental Site Assessment Report, at pp. 25-27.

14. Rikon Aff. at para. 18.

15. Rikon Aff. at para. 19, Ex. H, Phase I - Phase II Environmental Site Assessment Report, at p. 26; Ex. I, April 27, 2005 letter prepared by Lawrence P. Coddington, Senior Hydrogeologist, Ground Water Investigations, Inc. ( " The only onsite environmental concern recommended to be addressed prior to construction was approximately 700 cubic yards of debris recommended for removal and offsite disposal at an estimated cost ranging from \$35,000 to \$45,000 " ).

16. Rikon Aff. at para. 19.

17. Rikon Aff. at paras. 20-21.

18. Rikon Aff. at para. 22. See also: D'Onofrio v. The Village of Port Chester, 8 Misc. 3d. 1015(A), 2005 WL 1668403 ( West. Sup. 2005 ).

19. Rikon Aff. at Ex. H.

19. Rikon Aff. at para. 25.

20. Watkins Aff. at para. 24.

22. Watkins Aff. at para. 28.

23. Watkins Aff. at para. 5.

24. Watkins Aff. at para. 7.

25. Watkins Aff. at Ex. A.

26. Watkins Aff. at Ex. A.