

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 108 North Main Street, SBL No. 57.31-2-5; to effectuate the Village's Urban Renewal Plan.

DECISION/ORDER

Index Nos:
4853/08

Motion Date:
7/13/11

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In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 110 North Main Street, SBL No. 57.31-2-4 and 114 North Main Street, SBL No. 57.31-2-3 to effectuate the Village's Urban Renewal Plan.

Index Nos:
9013/08

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In the Matter of the Application of

THE VILLAGE OF SPRING VALLEY, relative to acquiring title in fee simple absolute, by the power of eminent domain, to the real property located in the Village of Spring Valley, New York, at 132 North Main Street, SBL No. 57.13-1-52, to effectuate the Village's Urban Renewal Plan.

Index Nos:
2064/09

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LaCAVA, J.

The following papers numbered 1 to 3 were considered in connection with the motion by condemnor Village of Spring Valley (Village) seeking to compel certain disclosure in these several associated matters, pursuant to the Court's January 26, 2011 Decision and Order, and the cross-motion by the several claimants for, *inter alia*, an Order striking the Interrogatories served by condemnor upon said claimants:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS	2
REPLY AFFIRMATION/EXHIBIT	3

Petitioner/condemnor Village commenced the instant petition to acquire by eminent domain certain real property, including those parcels known as and located at 108 North Main Street, Spring Valley, New York, otherwise denominated on the Tax Map of the Village of Spring Valley as Section 57.31, Block 2, Lot 5 (and otherwise known as SBL No. 57.31-2-5); 110 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.31-2-4; 114 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.31-2-3; and 132 North Main Street, otherwise denominated on the Tax Map of the Village as SBL No. 57.13-1-52. Said properties were previously owned by Reynold Cherisol; The Portuguese-American Community Center, Inc.; and Leonid Sandler, respectively, and are known, respectively, as the Cherisol, Portuguese-American, and Sandler properties. In a Decision and Order dated August 29, 2008, the petition granting a taking of these properties by eminent domain was granted. Fee and fixture claims have subsequently been made as to each of the properties.

Condemnor Village previously moved for disclosure, alleging that said disclosure is material and necessary for defense of the aforementioned claims. The Village asserted that the claimants have, with regard to the several claims, failed, despite repeated requests, to provide certain information including the date of installation of the various fixtures; the manner in which they were installed; the identity of the party or parties performing the installation; and the subsequent operation, modification (if any), and maintenance of the fixtures. The Court noted at that time that

the fixture claims with respect to the three fee claims include, respectively, 32 fixtures (Cherisol); 561 and 413 fixtures (Portuguese-American); and 97 and 95 fixtures (Sandler), respectively, or well over a thousand fixtures total. Claimants opposed condemnor's motion for discovery, asserting, *inter alia*, that the Village did not contest ownership of the fixtures; that depositions would inordinately prolong the matter or be a burden on claimants, and that the discovery sought by condemnor is not material since all proof of value at trial in a condemnation must be by way of appraisal. The Court also noted that condemnor does in fact contest ownership of a significant number of the fixtures as well as their actual status as fixtures.

In the aforementioned January 26, 2011 Decision and Order, the Court stated:

ORDERED, that condemnor is granted leave to serve upon the former fee owners of the parcels at issue here, and the various trade fixture claimants related thereto, Interrogatories, pursuant to CPLR §3130, the subject of said Interrogatories to be limited to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable, and the motion is in all other respects denied.

Condemnor served a set of Interrogatories on claimants on March 25, 2011, which sought, *inter alia*, trade fixture appraisals, mortgage applications, leases, certificates of occupancy, tax depreciation schedules, tax returns, surveys and building plans, and business loan applications. In an April 1, 2011 letter, claimants informed the Village that they were rejecting the Interrogatories *in toto*, alleging that said interrogatories included material outside the scope designated in this Court's January 26 order. In a series of subsequent emails, the Village repeatedly requested that claimants discuss which specific questions of the Interrogatories were objectionable. And, in response to the Village's repeated requests, claimants reiterated their view that the served Interrogatories exceeded the scope of the January 26 Decision and Order, and, for that reason, rejected them as a whole.

The Village now seeks an order to compel claimants to respond to each and every interrogatory set forth in the Village's March 25, 2011 interrogatories, *inter alia*. Claimants' cross-motion seeks an order adjudging the Village and its special Counsel to be in contempt of this Court's January 26 order, and striking the interrogatories served on March 25, 2011.

CONDEMNOR'S MOTION TO COMPEL ANSWER TO INTERROGATORIES

Upon a review of the record, the Court makes the following determinations:

1. Identifying information regarding the person answering the Interrogatories -- **GRANTED**.

2. Prior appraisals of the subject premises; prior trade fixture appraisals --

In tax assessment review proceedings under RPTL Article 7, CPLR §3140, and 22 N.Y.C.R.R. 202.59(g)(1) (Rule of Court 202.59 [g](1) govern the exchange of trial appraisal reports intended to be used at trial, which exchange takes place immediately prior to such trial. Pursuant to Rule of Court 202.61 (1), the practice on appraisal exchanges in condemnation matters is identical to that used in tax certiorari matters pursuant to Rule of Court 202.59 [g](1). It is well settled that any unexchanged and unfiled appraisal reports, prepared by an expert, qualify as material prepared in anticipation of litigation pursuant to CPLR 3101(d)(2) and are, therefore, not discoverable. (*See, 815 Associates v. State*, 251 A.D.2d 538 [2nd Dept. 2001]; *CMRC Corp. v. State*, 270 A.D.2d 27 [1st Dept. 2000]; *Schad v. State of New York*, 240 A.D. 2d 483, 484 (2nd Dept. 1997); *National City Bank v. State of New York*, 72 A.D.2d 762 (2nd Dept 1979); *Matter of Oyster Bay v. Town of Oyster Bay*, 54 A.D.2d 762 (2nd Dept 1976). The Village has made no effort to distinguish the practice on appraisal exchanges in condemnation matters, particularly involving fixtures, from that used in tax certiorari matters; and, indeed, *815 Associates* is a condemnation matter, hence the Court shall be governed by that and the other, aforementioned cases.

This immunity from disclosure is conditional, however, and subject to two main exceptions. Pursuant to CPLR 3101 (d)(2), for example, discovery of items otherwise discoverable, but which

may not be disclosed as prepared in anticipation of litigation or for trial,

may be obtained...upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Having failed to make a showing of need and undue hardship, condemnor cannot obtain such appraisals under CPLR §3101(d) (2).

The second exception to the rule, that appraisal reports which have not been exchanged and filed pursuant to the Rules of Court set forth above are not subject to disclosure, is that an opposing party may use prior unfiled appraisals of the subject property to impeach the appraisal expert with inconsistent statements contained therein. (See, *In the Matter of Hicksville Properties, Inc. v. The Board of Assessors of the County of Nassau*, 116 AD2d 717, 718 [2nd Dept 1986] -- "where an unfiled appraisal report was prepared by a party's trial expert and is inconsistent with his trial testimony, the unfiled report may be introduced into evidence for impeachment purposes and used to cross-examine the witness"; see also *Niagara Mohawk v. Town of Moreau*, 8 A.D. 3d 935 [3rd Dept. 2004] -- prior appraisals properly sought by trial subpoenas immediately before trial, for the purpose of impeaching the testimony of respondent municipality's expert witnesses).

Here, not only has no exchange of appraisals taken place, but no trial date has been set. While condemnor has not asserted that the appraisals are sought for the purpose of impeachment, even if that were the case, Interrogatories seeking such items for those purposes are quite premature. Thus, absent the aforementioned showing of need and undue hardship, or that the items sought were intended to be used for impeachment purposes, at an imminent trial, disclosure at this time of prior appraisals is inappropriate, and is thus **DENIED**.

3. Identification and production of mortgage applications, mortgages, leases, applications for Certificates of Occupancy, and Certificates of Occupancy -- **GRANTED**, as relevant to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures

alleged herein to be compensable.

4. Identification of the installer of trade fixtures, dates of installation, costs, and invoices -- **GRANTED**, as relevant to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable.

5. Production of tax depreciation schedules -- **GRANTED**, as relevant to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable, *except* as relates to demands for depreciation schedules of fee owners during years when fixture owners were tenants, which latter demands are **DENIED** with leave to renew upon proof that said fee owners sought depreciation allowances for fixtures alleged herein to be compensable.

6. Production of tax returns -- **GRANTED**, as relevant to and limited to the extent that such returns reflect the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable, *except* as relates to demands for tax returns of fee owners during years when fixture owners were tenants, which latter demands are **DENIED** with leave to renew upon proof that said fee owners' tax returns contain information which is relevant to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable.

7. Production of surveys and building plans -- **GRANTED**, as relevant to the cost, design, acquisition, dates of installation, manner of installation, operation, maintenance, and use of the fixtures alleged herein to be compensable.

Condemnor also seeks sanctions, and costs for the instant motion. To be sure, it is evident from the motion papers, namely the wholesale refusal by counsel for the claimants to answer even one of the several Interrogatories, several of which obviously and clearly fall within the scope of the Court's January 26, 2011 Decision and Order; and the failure of claimants to provide any explanation for this refusal, other than the assertion that the served Interrogatories were outside the scope of this Court's aforementioned prior Order; that claimants were employing a policy designed to frustrate the production of any disclosure as

directed by that Order. Had claimants legitimate objections to the Interrogatories, for example, they could have moved for a protective order, or even to strike the Interrogatories entirely. Consequently, while the Court declines to Order sanctions and/or costs for the instant motion **at this time**, the Court does grant leave to condemnor to seek, upon the close of the discovery phase of this action, such appropriate sanctions as may be warranted in the event that there is any noncompliance with the above directions.

CLAIMANTS' CROSS-MOTION

Contrary to claimants' assertions, a significant number of the items sought by condemnor in its served Interrogatories were clearly within the scope of this Court's January 26, 2011 Decision and Order. Thus, no grounds exist for any of the relief sought by claimants in their cross-motion.

Based on the foregoing, it is hereby

ORDERED, that the motion by condemnor seeking to compel compliance with the this Court's January 26, 2011 Decision and Order, namely by production of answers to served Interrogatories, and documents related thereto, is granted, to the extent that it is

ORDERED, that claimant is directed to provide responses and documents consistent with this Court's January 26, 2011 Decision and Order, and the instant Decision and Order, as set forth above, so as to be received by condemnor not later than 60 days after the date of the instant Decision and Order; and it is further

ORDERED, that the exchange of trial appraisals, consistent with this Court's regular practice and with Rule of Court 202.61, is directed to take place between the parties on or before December 16, 2011; and it is further

ORDERED, that the motion by condemnor seeking sanctions and/or costs for the instant motion, except as indicated above, is denied; and it is further

ORDERED, that the motion by condemnor is in all other respects denied; and it is further

ORDERED, that the cross-motion by claimants is in all respects denied.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
August 23, 2011

HON. JOHN R. LA CAVA, J.S.C.

Lawrence A. Zimmerman, Esq.
Hiscock & Barclay, LLP
50 Beaver Street
Albany, New York 12207

Philip A. Sanchez
Goldstein, Rikon & Rikon, PC
Attorneys for Claimants
80 Pine Street, 32nd Floor
New York, New York 10005-1701