

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

**COLUMBIA GAS TRANSMISSION,
LLC,**

Plaintiff,

v.

**AN EASEMENT TO CONSTRUCT,
OPERATE AND MAINTAIN A 20-
INCH GAS TRANSMISSION
PIPELINE ACROSS PROPERTIES IN
ALLEGHENY COUNTY,
PENNSYLVANIA, OWNED BY
UNKNOWN HEIRS OF PATRICK
PACE (PARCEL ID 0584-M-30),
LILLIAN MCKEE HARRIS,
UNKNOWN HEIRS AND ASSIGNS
(PARCEL ID 9929-X-01958), SARAH
AGNES MCDONALD, UNKNOWN
HEIRS AND ASSIGNS (PARCEL ID
9929-X-01962), and UNKNOWN
PERSONS AND INTERESTED
PARTIES,**

Defendants.

) CIVIL ACTION NO. 17-1191
)
) JUDGE JOY FLOWERS CONTI

CONTI, Chief District Judge

The court held a hearing today on a motion for partial summary judgment and immediate access (ECF No. 6) and a motion for summary judgment (ECF No. 12) in the above captioned civil action.

I. Background

Plaintiff Columbia Gas Transmission, LLC (“plaintiff” or “Columbia Gas”) brought this federal condemnation action in accordance with Federal Rule of Civil Procedure 71.1 governing proceedings to condemn real property and pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), with respect to three parcels of property located in Allegheny County (“three parcels” or the “properties”), Parcel Id. No. 584-M-30, Parcel Id. No. 9929-X-01958, and Parcel Id. No. 9929-X-01962. Specifically, plaintiff seeks easements on these properties to replace or repair existing gas pipelines to ensure the safety and reliability of the pipeline as part of a larger gas pipeline construction project.

In support of its motions for summary judgment (ECF Nos. 6 and 12), plaintiff filed its appendix with five exhibits, (ECF No. 7); its concise statement of material facts not in dispute (Exhibit 8)(referred to herein as “CSMF ¶ __”), and its briefs in support (ECF Nos. 9 and 13). Local Civil Rule of Court 56.E specifically provides that facts claimed to be undisputed and material in a party’s concise statement “will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted by a separate concise statement of the opposing party.” LCvR 56.E. Here, because no response has been filed, plaintiff’s concise statement of material facts are deemed admitted.

Plaintiff also submitted the following evidence in support of summary judgment:

- the Certificate of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission (Exhibit A);
- the Declaration of Anthony J. Sulkowski, JR. P.E., the project manager (Exhibit B);
- Description and Plat of Easements on Parcel ID No. 0584-M-30 (Exhibit C);
- Description and Plat of Easements on Parcel ID No. 9929-X-01958 (Exhibit D); and
- Description and Plat of Easements on Parcel ID No. 9929-X-01962 (Exhibit E).

(ECF No. 7).

No defendant filed an answer to this action or any response to the motions for summary judgment or the Concise Statement of Material Facts, although plaintiff provided additional notice by publication of this hearing in accordance with the court's December 12, 2017 order. (ECF Nos. 11, 16-1). In accordance with Federal Rule of Civil Procedure 71.1(e)(3), defendants by not answering waived all objection and defenses, except to the amount of compensation to be paid.

This condemnation action is governed by Federal Rule of Civil Procedure 71.1. At a trial in a matter for federal action of condemnation, the court is the factfinder in accordance with Rule 71.1(h)(1). Here, however, plaintiff seeks summary judgment, and accordingly, the court applies the standards under Federal Rule of Civil Procedure 56, in determining if plaintiff is entitled to summary judgment. Plaintiff also sought immediate access to the properties as part of its partial motion for summary judgment and seeks through its motion for complete summary judgment an order of judgment of taking by eminent domain with respect to the properties.

II. Standard for Summary Judgment

Summary judgment may only be granted where the moving party shows that there is no genuine dispute as to any material fact, and that judgment as a matter of law is warranted. FED. R. CIV. P. 56(a). The burden on a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is initially on the moving party to demonstrate that the evidence contained in the record does not create a genuine issue of material fact. Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 140 (3d Cir. 2004); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1080 (3d Cir.1996). A dispute is "genuine" if the evidence is such that a reasonable trier of fact could render a finding in favor of the nonmoving party. McGreevy v. Stroup, 413 F.3d 359, 363 (3d Cir. 2005).

Where the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the admissible evidence contained in the record would be insufficient to carry the nonmoving party's burden of proof or that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 325 (1986); Marten v. Godwin, 499 F.3d 290, 295 (3d Cir.2007). Where, however, as here, the moving party bears the burden of proof, "if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact, pre-trial judgment cannot be granted. Specious objections will not, of course, defeat a motion for summary judgment, but real questions about credibility, gaps in the evidence, and doubts as to the sufficiency of the movant's proof, will." Wallace v. Nat'l Indem. of Mid-Am., 2:14-cv-1253, 2016 WL 6948781, at *3, n.2 (W.D. Pa. July 8, 2016) (citing El v. Se. Pennsylvania Transp. Auth. (SEPTA), 479 F.3d 232, 238 (3d Cir. 2007)).

Once the movant meets its burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial" and to present sufficient evidence demonstrating that there is indeed a genuine and material factual dispute for a jury to decide. Fed. R. Civ. P. 56(e); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Celotex, 477 U.S. at 323–25. The nonmoving party must go beyond the pleadings and designate specific facts by the use of affidavits, depositions, admissions or answers to interrogatories showing that there is a genuine issue of material fact for trial. Id. at 324. The nonmoving party cannot defeat a well-supported motion for summary judgment by simply reasserting unsupported factual allegations contained in pleadings. Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1989).

The summary judgment inquiry asks whether there is a need for trial—"whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250.

In ruling on a motion for summary judgment, the court's function is not to weigh the evidence, make credibility determinations or to determine the truth of the matter, but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000) (citing decisions); Liberty Lobby, 477 U.S. at 248–49; Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 643 n. 3 (3d Cir. 1998). In evaluating the evidence, the court must interpret the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in his or her favor. Watson v. Abington Twp., 478 F.3d 144, 147 (3d Cir. 2007). Inferences based upon speculation or conjecture, however, do not create a material factual dispute sufficient to defeat a motion for summary judgment. Robertson v. Allied Signal, Inc., 914 F.2d 360, 382 n.12 (3d Cir. 1990).

III. Natural Gas Act and Commission Determination

The Natural Gas Act applies to the transportation of natural gas in interstate commerce. 15 U.S.C. § 717(b). Columbia is an interstate natural gas company engaged in the transportation and storage of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. § 717a, and subject to the jurisdiction of the Federal Energy Regulatory Commission (the “Commission”) in accordance with § 717a(d)(6). (Ex. A at 4, ¶ 3).

By order dated February 1, 2016, the Commission approved Columbia Gas’ application for a certificate of public convenience and necessity authorizing Columbia to construct, operate, and abandon natural gas pipeline and above ground facilities in order to replace three segments of existing aging infrastructure in Allegheny, Greene, and Washington Counties, Pennsylvania, along its existing Line 1570 (“Tri-County Bare Steel Replacement Project” or “project”). CSMF

¶ 2; Ex. A. The Commission issued a certificate of public convenience and necessity (“certificate”) with respect to replacing the existing gas pipeline in several counties, including Allegheny County wherein the three parcels relevant to this action are located. (Ex. A.). The properties relevant to this action are located in the third segment of the Tri-County Bare Steel Replacement Project. (Ex. A at 6, ¶ 7). Additionally, as found by the Commission, Columbia Gas has taken the necessary steps to minimize adverse impacts of the project to landowners and communities. (Ex. A. ¶ 19).

Section 717f(h) of the Natural Gas Act grants the right of eminent domain relevant to this action. That section provides:

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

15 U.S.C. § 717f(h).

IV. Plaintiff’s efforts to locate owners of property to be taken

Plaintiff took reasonably diligent efforts to locate the owners of the properties by engaging its abstractors to search publicly available records, including the Offices of the Prothonotary, the Recorder of Deeds, the Treasurer, the Allegheny County Real Estate Portal and

Tax Assessor's website, as well as the Register of Wills and guardianship estate records. Its abstractors also searched online genealogy resources and websites such as rootsweb.com, ancestry.com, and familytree.com. Columbia also searched its own internal records to supplement the record title search. It was able to locate all other property owners, but was unable to locate the owners of the three properties at issue in this action. (ECF No. 4, ¶¶ 3, 4).

Because the identity of the owners of the property involved in this condemnation proceeding were unknown despite diligent efforts, service of this action upon defendants was by publication in accordance with Federal Rule of Civil Procedure 71.1(d)(3)(B) (governing service by publication in condemnation actions), (ECF Nos. 4; 4-1), and no defendant responded. Additionally, plaintiff provided notice by publication of today's hearing in accordance with the court's order on December 12, 2017 (ECF Nos. 11, 16-1), and no defendant appeared.

Specifically, Columbia Gas seeks by condemnation:

- an easement to be taken on Parcel Id. No. 0584-M-30, owned by the unknown heirs of Patrick Pace, which is a temporary workspace of 0.08 acres for the construction of the pipeline and appurtenant facilities as depicted on the survey map. (ECF Nos. 1, ¶ 10; 1-3 at 2-3);
- an easement to be taken on Parcel ID No. 9929-X-01958, owned by Lillian McKee Harris, Unknown Heirs and Assigns, which is a temporary workspace of 0.11 acres for the construction of the pipeline and appurtenant facilities as depicted on the survey map. (ECF Nos. 1, ¶ 11; 1-4 at 2-3); and
- easements to be taken on Parcel ID No. 9929-X-01962, owned by Sarah Agnes McDonald, Unknown Heirs and Assigns, which are a permanent easement of 133 square feet, less than 0.01 acres, a temporary workspace totaling .08 acres, and additional temporary workspace of .10 acres for the construction of the pipeline and appurtenant facilities as depicted on the survey map. (ECF Nos 1, ¶ 12; 1-5 at 2-3).

Columbia Gas further asserts that it needs access to these properties by January 18, 2018, in order to meet the deadline for gas needs for the 2018-1019 winter heating season, which is due

in part to restriction from work clearing the right-of-way during April 1, 2018, through October 15, 2018, in order to protect endangered bat species. (ECF No. 8, ¶¶ 16-19.)

V. Plaintiff Entitled to Take the Easements by Eminent Domain under the Natural Gas Act

Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f (h), provides the right of natural gas suppliers holding a certificate of public convenience and necessity, such as Columbia Gas, to exercise eminent domain where they are unable to acquire the required rights-of-way or necessary land to construct, operate, and maintain natural gas pipe line transportation, including the location of compressor stations or equipment to operate the pipe lines. As to these three properties, Columbia Gas, who is a holder of a certificate of public convenience and necessity, cannot acquire the easements for the necessary right-of way with respect to the project either by contract or with respect to agreement with the owner as to the compensation to be paid because it has been unable to locate and contact the owners through diligence. (ECF No. 8 at 2, ¶ 4). Thus, pursuant to § 717f(h), Columbia Gas is entitled to condemn the property by taking the easements indicated.

A. Request for Immediate Access

Plaintiff with its initial motion for partial summary judgment also requested immediate access to the properties to complete clearing and complete necessary gas pipe line repair and replacement in advance of the 2018-2019 winter heating season and to meet commitments to the Commission and local government, CSMF ¶ 16, for its project to replace the existing 20-inch gas pipeline with a new 20-inch pipeline that involves the necessity for access to the properties in advance to clear portions of the land to repair and replace the pipeline.

Plaintiff indicates that it needs access to the properties by January 15, 2018, in order to complete clearing for segment 3 prior to March 31, 2018, in order to not disturb certain protected bat species located along segment 3 and to honor commitments to the U.S. Fish and Wildlife Service to protect threatened bat species, and comply with its permit. CSMF ¶¶ 17, 18. This timeline is further required in order to complete the replace and repair work by the winter season. CSMF ¶¶ 16, 18. Line 1570 provides natural gas to local distribution companies which provide service to the Pittsburgh metropolitan area. CSMF ¶ 11. The public will suffer substantial harm if Columbia is unable to safely and efficiently provide natural gas to the Pittsburgh metropolitan area from line 1570 by completing this project. CSMF ¶¶ 11, 19.

Because the court will enter a judgment order of taking by condemnation with respect to the easements upon the three parcels, and the order will be entered prior to January 15, 2018, plaintiff will be entitled to access the properties, making the request for “immediate access” moot.

B. Valuation

Upon taking, the deprived party is entitled to just compensation. United States v. Certain Parcels of Land, 144 F.2d 626, 629, (3d Cir. 1994). In Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 4 n.2 (1984), the Court acknowledged that former Federal Rule of Civil Procedure 71A(h), which was the precursor to Rule 71.1(h), created a nationally uniform practice for federal condemnation proceedings. Where, as here, plaintiff has brought this condemnation proceeding under the federal power of eminent domain, state law procedure with respect to condemnation is inapplicable, the procedure established by Rule 71.1(h) governs and the matter is tried to the court under Rule 71.1(h)(2). Northern Border Pipeline Co. v. 64.111 Acres of

Land in Will County, Illinois, 344 F.3d 693, 694 (7th Cir. 2003); Guardian Pipeline, L.L.C. v. 295.49 Acres of Land, Nos. 08-C-0028, 08-C-54, 08-C-29, 08-C-30, 2008 WL 1751358 (E.D. Wis. April 11, 2008).

If a party in a matter involving the federal power of condemnation seeks a jury to determine valuation, the court within its discretion may determine valuation itself or appoint a commission or jury to determine valuation. Northern Border Pipeline Co., 344 F.3d at 694; Guardian Pipeline, L.L.C. v. 295.49 Acres of Land, Nos. 08-C-0028, 08-C-54, 08-C-29, 08-C-30, 2008 WL 1751358 (E.D. Wis. Apr. 11, 2008); see Columbia Gas Transmission, LLC v. An Easement to Construct, Operate and Maintain a 20-inch Gas Transmission Pipeline Across Properties in Washington County, Pennsylvania, No. 16-1243, 2017 WL 544596 (W.D. Pa. Feb. 9, 2017).

The guarantee of just compensation:

also applies where the Government takes only a portion of the bundle of rights in property held by a landowner. Where the Government condemns only a part of a landowner's holding—as in the case of its taking [] easements—just compensation is measured by the difference between the market value of the entire holding immediately before the taking and the remaining market value immediately thereafter of the portion of property rights not taken.

United States v. 68.94 Acres of Land, More or Less, Situate in Kent Cty., State of Del., 918 F.2d 389, 393 n.3 (3d Cir. 1990).

Columbia Gas contends in its filings that the diminution of value as a result of the easements taken by condemnation here is minimal because the easements are upon land that appears to be abandoned property and strips of vacant land. The defendant landowner in a federal condemnation proceeding bears the burden of establishing just compensation, United States ex rel. and for Use of Tennessee Valley Authority v. Powelson, 319 U.S. 266, 273 (1943), which ordinarily is satisfied through expert testimony. United States v. 429.59 Acres of Land,

612 F12d 459, 462 (9th Cir. 1980). Nominal damages are appropriate because although defendant landowners are entitled to “just compensation” for the taking, they did not appear to contest the condemnation and taking or to offer a valuation, must less evidence through any expert, and thus necessarily did not meet their burden of establishing just compensation. Hardy Storage Co., LLC v. An Easement to Construct, Operate and Maintain 12-inch and 20-inch Gas Transmission Pipelines Across Properties in Hardy, Civ. Act. Nos. 2:06CV7 & 2:07CV5, 2009 WL 900157 (N.D. W.Va. Mar. 31, 2009) (summary judgment awarding \$600.00 with respect to just compensation where landowner failed to establish with admission evidence the diminution in value and plaintiff offered \$600.00 in compensation); see Carey v. Piphus, 435 U.S. 247, 266 (1978) (plaintiff may recover nominal damages in case of constitutional injury even if no compensable injury shown).

In these circumstances, where defendants did not meet their burden and particularly where the easements are in minimal size and scope and over vacant and abandoned property, nominal damages are appropriate as plaintiff urges. Plaintiff, like the plaintiff in Hardy Storage Co., should, however, suggest to the court an actual amount of nominal damages for the court to award with respect to each property. Columbia Gas urges that nominal damages be awarded.

VI. Conclusion

Accordingly, plaintiff is entitled to a judgment of taking by condemnation in favor of plaintiff and against defendants, with an award in the amount of \$400.00 in nominal damages for Parcel Id. No. 0584-M-30; in the amount of \$550.00 in nominal damages for Parcel Id. No. 9929-X-01958; and in the amount of \$931.00 in nominal damages for Parcel Id. No. 929-X-

01962 in favor of defendants and against plaintiff for just compensation to be paid into the court's registry in accordance with Federal Rule of Civil Procedure 67(a) for the easements taken. Appropriate orders will follow.

Dated: January 10, 2018

BY THE COURT,

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Judge