

**City of Saratoga Springs v Saratoga Real Estate,
LLC**

2017 NY Slip Op 33162(U)

June 19, 2017

Supreme Court, Saratoga County

Docket Number: Index No. 2017135

Judge: Thomas D. Buchanan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

FILED

STATE OF NEW YORK
 SUPREME COURT COUNTY OF SARATOGA

2017 JUL 17 PM 2:15

CITY OF SARATOGA SPRINGS,

SARATOGA COUNTY
 CLERK'S OFFICE
 BALLSTON SPA. NY

Petitioner,

DECISION AND ORDER

vs.

Index No. 2017135

**SARATOGA REAL ESTATE, LLC &
 ROBIN COURTNEY,**

Respondents.

Buchanan, J.:

Respondent Robin Courtney has moved, pursuant to CPLR 3211, to dismiss the Petition in this matter. Petitioner commenced this proceeding under the Eminent Domain Procedure Law seeking to acquire an easement over certain real property located in the City of Saratoga Springs for the purpose of constructing a public sidewalk. Mr. Courtney asserts multiple grounds for dismissal. Some of those grounds, however, amount to arguments offered on behalf of respondent Saratoga Real Estate, LLC. Courtney identifies himself as the Managing Member of this LLC, but because he is not a licenced attorney, he cannot represent the LLC in this proceeding (*see e.g. Michael Reilly Design, Inc. v. Houraney*, 40 AD3d 592 [2d Dept 2007]). Therefore, arguments offered by Mr. Courtney (hereinafter, "Respondent") on behalf of the LLC cannot be considered on this motion.

The Court's reading of Respondent's motion papers also reveals several arguments which appear to go to the merits of the eminent domain proceeding, rather than raising grounds for a motion to dismiss. The arguments asserted by Respondent that fall within the grounds for dismissal found in Rule 3211 will be address in the order in which they appear in that rule.

1. Defense Founded Upon Documentary Evidence (CPLR 3211[a][1]). A defense founded upon documentary evidence, as that term is used in CPLR 3211, requires documentary evidence which conclusively refutes the petitioner's allegations, establishing a defense as a matter of law (*see e.g. Shuttle Contracting Corp. v. Peikarian*, 108 AD3d 516 [2d Dept 2013]). In his affidavit, Respondent alleges that the deed and survey annexed to the Petition contain inaccuracies which require dismissal of the Petition. The Court's review of these exhibits does not reveal inaccuracies which merit dismissal.

A government entity which desires to obtain property through eminent domain is known as a "condemnor." A condemnor other than the State of New York (such as Petitioner here) is required by the Eminent Domain Procedure Law to obtain an order from the Supreme Court granting permission (1) to acquire the property and (2) to file an acquisition map with the County Clerk (EDPL §402[B]). Annexed to the Petition are copies of a deed to the subject property dated December 7, 2008 (Exhibit E) and a map of the proposed easement (Exhibit D). The deed found at Exhibit E is a copy taken from the real property records of Saratoga County. The Petition states that the deed is annexed in order to identify the property over which Petitioner seeks an easement for the purpose of building a sidewalk, as well as its owner. The Petition describes the map annexed to it in Exhibit D as the proposed acquisition map, which the Petition seeks permission to file. The term "acquisition map" is defined in EDPL §103. That definition does not require the features (such as a surveyor's stamp) decried by Respondent as fatal omissions. The map must simply "delineate the perimeter" of the proposed project. This Court's examination of the map shows that it appears to do just that. Neither exhibit contains inaccuracies which conclusively refute Petitioner's allegations.

A closer review of Respondent's motion papers shows that he is also attacking the legal description of the proposed easement found in paragraph 8 of the Petition itself. Respondent supplies a report from an Engineer-In-Training who reviewed the Petition at Respondent's request. The report notes that the legal description contained in the Petition is missing one of the courses necessary to describe the perimeter of the proposed easement. The Court's own review of the description and the map at Exhibit D shows that the report correctly identifies a "gap" in the legal description found in the Petition, in that

it does not recite a course-and-distance description for the western boundary of the proposed easement. That course, however, coincides with the western boundary of the subject property shown on the map. The area of the easement sought to be taken by Petitioner is thus effectively defined by the Petition and exhibits, even though the western boundary is not included in the legal description found in the Petition. While an error in the legal description of property being condemned can raise a question of fact in support of a defense to a condemnor's petition (*UAH-Braendly Hydro Associates v. RKDK Associates*, 138 AD2d 493 [2d Dept 1988]), it does not appear to this Court that the error pointed out by the report conclusively refutes the allegations of the Petition. Instead, this error could be easily corrected by the order issued on Petitioner's application. Respondent's first ground for his motion to dismiss thus fails.

2. Subject Matter Jurisdiction (CPLR 3211[a][2]). Respondent asserts that the Court lacks subject matter jurisdiction in this proceeding because Respondent does not have an interest in the property. Beyond the fact that Respondent has attempted to make several submissions to the Court on this motion to indicate that he is, in fact, the owner of the subject property, it appears that Respondent misapprehends the nature of subject matter jurisdiction. Subject matter jurisdiction, which is the power of a court to consider a particular kinds of case, is conferred by constitutional grant. In New York, the Supreme Court is endowed with "general jurisdiction in law and equity" (NY Const art VI §7). Indeed, as discussed above, the Eminent Domain Procedure law specifies that this proceeding must be brought in Supreme Court (EDPL §501[B]). This Court's power to hear this proceeding is unaffected by Respondent's status vis-à-vis the subject property. This ground for Respondent's motion fails, as well.

3. Lack of Personal Jurisdiction (CPLR 3211[a][8]). Respondent makes two arguments in support of his position that the Court lacks personal jurisdiction over him. First, he asserts that he has been improperly named as a respondent because he has no interest in the subject real property. As noted above, this argument is problematic in that Respondent has made several attempted submissions to the Court in an effort to take the position that he is the record owner of the property. Moreover, as was the case with respect to subject matter jurisdiction, Respondent's status as owner of the subject property

does not determine the question of personal jurisdiction. Personal jurisdiction is conferred upon a court by service of process upon a defendant while they are present in this state (see Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C301:2).

This brings us to Respondent's second argument, that he "has not received service in any form demanded by NYCPLR §308." While Respondent correctly points to the CPLR provision for personal service on an individual, he overlooks the particular service requirements of the Eminent Domain Procedure Law. As pointed out by counsel for Petitioner, EDPL §402 gives a condemnor two options for serving notice of its petition upon the record owner of the property: (1) by a method pursuant to the CPLR or (2) by registered or certified mail. The Petition states that the record owner of the subject property as of the date of the Petition was Saratoga Real Estate, LLC, as shown in the deed found at Exhibit E to the Petition. On this motion, Petitioner submits a copy of an affidavit of service upon Saratoga Real Estate, LLC through its registered agent for service of process.

The Petition also notes, however, various transactions between Petitioner and Respondent, including a prior civil suit, in which Respondent has held himself out as the owner of the property. Petitioner thus named Respondent as a party to this proceeding and took steps to serve him with notice. Counsel for Petitioner submits her affirmation with annexed exhibits, in which she states that Petitioner published the notice as required by §402 and mailed it in proper form to Respondent by certified mail, return receipt requested, addressed to Respondent at 80 Berkshire Road, West Babylon, NY 11704. Counsel states that the mailed notice was returned to her as refused, not undeliverable. The Court notes Respondent has listed this same address as being his own in his submissions to the Court. The Court further notes that EDPL §402 does not specify that receipt of the notice is required for service to be complete. Counsel's affirmation thus provides *prima facie* proof that Respondent was served with notice pursuant to EDPL §402 (see *Wechsler v. Kulukundis*, 130 AD2d 892 [3d Dept 1987]). Respondent's motion papers make no mention of his having moved from the aforementioned address, nor does he allege any other facts in support of his statement that he did not receive the notice. His motion thus

amounts to a "mere denial" of receipt, which is insufficient to overcome Petitioner's *prima facie* showing of service (*Dayco Mechanical Services, Inc. v. Toscani*, 94 AD3d 1214 [3d Dept 2012]). Respondent's motion fails on this ground.

4. Lack of Persons or Entities That Should be Parties (CPLR 3211[a][10]).

Respondent asserts that the Petition denies due process to several persons and entities that should be parties due to their various interests in the subject property. At the outset, Petitioner points out that the entities and parties identified by Respondent were granted their various interests in the property by a document executed after the commencement of this proceeding. Petitioner also points out that it filed a Notice of Pendency in compliance with EDPL §402 at the time this proceeding was commenced, which gave notice to all entities who acquired any interest in the property thereafter. The Court's reading of the other documents annexed to Respondent's motion papers concerning the adjacent Beaver Pond Village property shows that those documents do not confer any interest in the property that is the subject of this proceeding.

As discussed above, Petitioner published and served notice of this proceeding as required by EDPL §402. If, as this proceeding progresses, it appears to the Court that other parties must be present in order for complete relief to be afforded, the Petition can be amended to accommodate that need (CPLR §1001). Respondent's motion fails on this ground.


The parties' remaining contentions have been considered, but do not affect the outcome of this motion. Therefore, in consideration of all the foregoing, it is hereby


ORDERED, that the motion by respondent Robin Courtney to dismiss this proceeding is DENIED; and it is further

ORDERED, that respondent Robin Court shall have ten (10) days from the date of service upon him of a copy of this Decision and Order, with notice of entry, to serve his Answer upon Petitioner.

Dated: June 19, 2017

ENTER.

ENTERED
Craig A. Hayner

Saratoga County Clerk 5


Thomas D. Buchanan
Supreme Court Justice
SARATOGA COUNTY
CLERK'S OFFICE
BALLS BLVD., NY
2017 JUL 17 PH 2:16

ENTERED

Papers considered:

Notice of Petition; Petition, with annexed exhibits; Notice of Pendency; "Motion to Dismiss"; Affidavit of Robin T. Courtney [2/3/17], with annexed exhibits; Notice of Motion to Dismiss - Amended; Motion to Dismiss - Amended; Affidavit of Robin T. Courtney [3/3/17], with annexed exhibits; Affirmation in Opposition of Asish A. Nelluvely, Esq., with annexed exhibits; Affirmation in Support of Dismissal of Robin T. Courtney [unsworn]; Sur-Reply Affirmation of Asish A. Nelluvely, Esq.