

Appealing the Condemnation Case

*Presented by James M. Turteltaub, Esq.
Carlin and Ward, P.C.*

Appealing issues in condemnation actions raises some special considerations which may not be present in other cases. This article is intended to highlight some of those issues in order to facilitate your practice in this area.

A. Condemnation actions have two final judgments and one award of commissioners which all must be appealed separately.

Condemnation actions have two final judgments which may be appealed to the Appellate Division as a matter of right. Rule 2:2-3(a). The first final judgment pertains to the condemnor's taking of property and the appointment of commissioners. N.J.S.A. 20:30-8, N.J.S.A. 20:3-2(j), and N.J.S.A. 20:3-12(b). The second final judgment establishes the amount of just compensation to be paid for the taking. N.J.S.A. 20:3-12(g)(h). See also Housing Authority of City of New Brunswick v. Suydam Investors, L.L.C., 177 N.J. 2, 16 (2003).

"Judgment" means the adjudication by the court of any issue of fact or law, or both, arising under [the Eminent Domain A]ct. The adjudication of the right to condemn shall be a final judgment. All other judgments shall be interlocutory or final, according to law, or as may be prescribed by the rules. N.J.S.A. 20:3-2(j)

Any appeal on the right to take must be filed within 45 days of the entry for Judgment and Appointment of Commissioners. The condemnee cannot wait until the end of the value litigation to appeal the right to take or any other issue addressed in the order. Moreover, any claims which impact the Order for Judgment and Appointment of Commissioners must be addressed in the context of that final order and not in the valuation proceeding.

Suydam is an example of appeals as they relate to the two final judgments. In Suydam, the Housing Authority sought to amend its complaint and therefore, the Final Order for Judgment and Appointment of Commissioners nearly one year after the Final Judgment had been entered. The amendment was to preserve the Housing Authority's right to seek reimbursement of any environmental remediation costs which might be incurred after the taking. The court permitted the amendment over Suydam's objection.

Pursuant to Rule 2:2-3(a), Suydam filed an appeal as of right with the Appellate Division. The valuation case was stayed while the amendment was on appeal. The matter proceeded through the Supreme Court which rendered its decision more than three years after the filing of the complaint.

The valuation case proceeded once the issues concerning the Final Order for Judgment and Appointment of Commissioners were finally resolved. In Suydam, the parties ultimately settled the issue of just compensation before trial. If the matter was tried, however, the rulings and conduct of the trial and subsequent order for final judgment would have been subject to a separate appeal pursuant to Rule 2:2-3(a).

1. Appeals from the award of commissioners.

Condemnation actions also may involve appeals from the award of commissioners. At the outset of the action, the Court appoints three disinterested parties as commissioners who are charged by the Court to determine the amount of just compensation. N.J.S.A. 20:3-12(b). The Commissioners then conduct a hearing during which the condemnor presents its valuation case. In addition, the condemnees may also present their case of just compensation. The commissioners then file an award of just compensation with the Court. This is called the “Report of Commissioners.”

Any party that appeared at the commissioners’ hearing may appeal the commissioners’ award of just compensation by filing a notice of appeal with the Court within 20 days after the receipt of the commissioners’ report. R. 4:73-6. This time is substantially less than that provided for under Rule 2:4-1. Although this should not be relied upon, the appeal period may be extended 30 days by the court for good cause shown. R. 4:73-1. The notice of appeal must also be served on those parties which appeared at the commissioners’ hearing. In addition, any party may file a demand for the appeal to be heard by a jury either as part of the notice of appeal or a separate filing made within 10 days after service of the notice of appeal. The notice of appeal must also include an application for an order fixing the date of trial and other scheduling which the parties may require. Id.

Each party must file its own appeal of the commissioners’ award instead of relying on the fact that another party has filed an appeal. See unreported trial court decision in Housing Authority of the City of Newark v. Batista, Docket Nos. ESX-L-3118-06 and 3140-06 (Law Div. 2007). In Batista, the property owner filed an appeal of the commissioners’ award. The Housing Authority relied on the property owner’s filing and did not file its own appeal of the award. Before trial, the property owner decided to withdraw its appeal and moved for the entry of final judgment. The City opposed the motion arguing its right of appeal was preserved by the property owner’s appeal. The Court permitted the property owner to withdraw its appeal pursuant to Rule 4:37-2(b). The Court stated:

Defendants should be allowed to withdraw their appeal and should not be saddled with [the] burden of preserving the rights of the Housing Authority.

Batista, Letter Opinion at 3.

The Court also held that it did not have the discretion to enlarge the time for the Housing Authority to file its own appeal. The Court noted the “dangers of relying on another party to preserve its appeal” and quoted the following from State v. Tenenbaum, 151 N.J. Super. 273, 278 (App. Div. 1977):

By [filing a notice of appeal within time] the rights of all parties would be protected against dismissals and other contingencies which might arise, with only a modicum of effort and diligence on their part.

Such a result would circumvent the mistrust which arises in such situations, i. e., condemnees could not then claim that the condemnor filed an appeal with the intent of subsequently withdrawing it, thereby dismissing the appeal and preventing the landowners from contesting the award. It would also inhibit a party who was satisfied with the award from sitting back and waiting for favorable economic changes, and then months later filing an appeal after the diligent party had been granted a dismissal of its appeal.

This policy would have the further effect of lucidly setting out the issues involved and the contentions of the parties; of avoiding calendar problems and delaying tactics and providing for the finality of such litigation, which is so important in this area of the law; of promoting the public interest; of preventing parties from unduly relying upon others to perform their specific duties; and generally, of avoiding the confusion engendered by situations similar to the one at bar.

Batista, Letter Opinion at 2 quoting from Tenenbaum, 151 N.J. Super. at 278 (App. Div. 1977) quoting from Stark v. Stark, 95 N.J. Super. 1152, 163-64 (Law Div. 1967).

B. Staying the condemnors’ actions during a property owner’s challenge to the taking

1. Stays while the action is pending before the Trial Court

When a property owner objects to the taking at the trial court, all further steps in the condemnation action are stayed until the issue is finally determined at the trial court level. N.J.S.A. 20:3-11. The stay while the matter is pending before the trial court is by right and not subject to the regular standards for temporary restraints. See Bridgewater Twp. v. Yarnell, 64 N.J. 211, 215 (1974); See also. Township of West Orange v. 769 Associates, L.L.C., 172 N.J. 564, 572 (2002) (affirming that the power of eminent domain is “subject to several important constitutional limits” including the protection that “no person shall be deprived of his or her property without due process of law.”)

2. Stays while the action is pending before the Appellate Division and Supreme Court.

A property owner does not have the automatic right to a stay while its appeal challenging the taking is before the Appellate Division. County of Sussex v. Merrill Lynch Pierce Fenner & Smith, Inc., 351 N.J. Super. 66, 73 (Law Div. 2001) aff’d., 351 N.J. Super. 1 (App. Div. 2002).

It is inconceivable that the legislature could have intended to obliterate the entire jurisprudence governing the granting of a stay of judgment insofar as it applies to this single (not particularly important compared to some other issues) issue of the authority to condemn. Furthermore, if the legislature did have such an unusual intent when it adopted N.J.S.A. 20:3-11, there is a real question as to whether the legislature would have the constitutional right to interfere so unusually and drastically with the exercise of judicial discretion with respect to enforcement of judgments. I will not interpret N.J.S.A. 20:3-11 in the way plaintiff argues it should be interpreted, absent an Appellate Division or Supreme Court decision unequivocally requiring me to do so.

Merrill Lynch, 351 N.J. Super. at 73.

Instead, the property owner must satisfy the test for injunctive relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). See also Rule 2:9-5 (“a stay with or without terms may be ordered in a civil action.”) “The intent of the rule is that the Court should exercise its discretion in each case based on its own merits...” Pressler, Current N.J. Court Rules, Comment R. 2:9-5(a) Paragraph 1, (Gann). Pursuant to Crowe, the party seeking the stay must:

- 1) Demonstrate that, in the absence of such a stay, the claimant will suffer irreparable injury;
- 2) Demonstrate that the legal right underlying the claim is settled;
- 3) Demonstrate a reasonable probability of ultimate success on the merits, and
- 4) Demonstrate that the probability of harm to other persons will not be greater than the harm the claimant will suffer in the absence of such relief.

Crowe, supra, 90 N.J. at 132-13.

When seeking a stay while the action is pending before the Appellate Division, the property owner must first move for the stay before the trial court. R. 2:9-5(b). The decisions of a trial court to grant or deny a stay of its judgment is then subject to immediate review by the Appellate Division. Merrill Lynch, supra, 351 N.J. Super. at 73.

The Merrill Lynch case is the only reported decision on this issue. Merrill Lynch was a tenant in a building purchased by Sussex County for its government offices. The County then filed a condemnation action to acquire Merrill Lynch's leasehold interest in the property. Merrill Lynch challenged the taking of its leasehold interest by claiming the County had purchased the building subject to the lease and could not terminate the lease by using eminent domain.

The trial court ruled the County had the right to condemn Merrill Lynch's leasehold interest. Merrill Lynch then filed an appeal and moved to stay the County's possession of the property. The trial court held that the tenant was not entitled to an automatic stay of possession under N.J.S.A. 20:3-11 while the matter was pending on appeal. The trial court instead held that “the determination of whether a judgment should be stayed pending appeal is one that very much

depends on the facts, circumstances and equities of each individual case.” Merrill Lynch, *supra*, 351 N.J. Super. at 73. The trial court then denied the stay because the appeal did not raise an important issue challenging the authority to condemn. Id. at 73. The appeal merely addressed tenant’s rights in a condemnation proceeding. Id. at 74. The trial court specifically distinguished its decision with the holding in Yarnell by stating Merrill Lynch’s challenge did not raise the “issue of arbitrariness of any kind with respect to the exercise of the power to condemn.” Id.

C. Fee applications for successful defenses to a taking

A property owner is entitled to reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney and engineering fees actually incurred when it successfully moves to dismiss a condemnation case. N.J.S.A. 20:3-26(c), Rule 4:49-2(a)(8) and Rule 2:11-4. application. These fees and costs are awarded on motion to each court which rules to dismiss the action. The application for costs incurred before the trial court are therefore made to the trial court. The application is by motion which is accompanied by an Affidavit of Services and Statement of Fees received. Rule 4:49-2(b) and (c).

When the property owner prevails on appeal, the fee application must be made to the Appellate Division within 10 days of the determination on appeal. Rule 2:11-4. The application to the Appellate Division must be done by motion which is supported by affidavits prescribed by Rule 4:49-9(b) and (c). The application must also state the amount previously paid to the attorney both at the trial court and Appellate Division. The application must also indicate any arrangements made for the payment of fees in the future. If the matter is remanded to the trial court, the Appellate Division may also refer the issue of fees to the trial court in lieu of making its own award.

D. Conclusion

Appeals in condemnation cases may raise issues not present in other cases. As with any type of litigation, the practitioner must be sure to check the relevant rules and statutes to make sure nothing is missed. This includes a through reading of the Eminent Domain Act, N.J.S.A. 20:3-1 et seq., Condemnation Rules, R. 4:73-1, et seq. along with the other Rules of Court. See also Rule 1:3-4.