SUPREME COURT OF NEW JERSEY
NO. 64,032

IRON MOUNTAIN INFORMATION MANAGEMENT, INC., a Corporation of the State of Delaware, Plaintiff vs. THE CITY OF NEWARK, THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK and THE CENTRAL PLANNING BOARD OF THE CITY OF NEWARK, and the NEWARK HOUSING AUTHORITY Defendants	ON PETITION FOR CERTIFICATION OF THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-006561-06T2 SAT BELOW: Mary Catherine Cuff, J.A.D. Linda G. Baxter, J.A.D. Clarkson S. Fisher, J.A.D.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

Iron Mountain Information Management's ("Iron Mountain or Plaintiff") Petition demonstrates that this matter presents two important questions, each of which merits that this Court resolve same by granting certification. The City minimizes the importance of these issues before this Court and disregards much of the case law cited by Plaintiff including the United States Supreme Court's decisions in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) and Schroeder v. City of New York, 371 U.S. 208 (1962) which deal directly with the statutory adequacy of notice provisions vis a vis the fundamental right to due process. An examination of these cases as well as the Trial Court's and Appellate Division's holding in State v. Jan-Mar, Inc., and the out of state cases cited therein, dictates that a commercial tenant who possesses an option to purchase in its lease, possesses a property interest equivalent to that of the property owner for purposes of notice. This notice must comply with the constitutional requirements set forth in Harrison Redevelopment Agency v. DeRose, 398 N.J. Super. 361, 408 (App. Div. 2008). As such, Iron Mountain should have been provided notice of the redevelopment process in order to file a timely challenge thereto.

LEGAL ARGUMENT

POINT I

IRON MOUNTAIN'S PETITION FOR CERTIFICATION IS WELL SUPPORTED BY BOTH STATE AND FEDERAL CASE LAW

The City does not dispute that Iron Mountain, as a tenant with an option to purchase in its lease, possesses standing to challenge the City's blight designation by way of a timely prerogative writ action. Instead, the City adopts the position that Iron Mountain does not have the right to receive personal notice advising them when such a timely challenge should be brought. Clearly, this position does not comport with the requirements of due process.

The Appellate Division in DeRose, held that the notice provisions set forth in the Local Redevelopment and Housing Law ("LRHL") were inadequate under both the Federal and State Constitution. Id. at 421. In arriving at this conclusion, the Appellate Division relied on the holdings in Mullane and in Brody v. Vill. of Port Chester, 434 F.3d. 121 (2d Cir. 2005).

In Mullane, the Supreme Court held that Central Hanover's notification of a judicial settlement of accounts via publication in a local newspaper was insufficient under the Fourteenth Amendment as it related to beneficiaries of the trust whose whereabouts were known or readily ascertainable. Mullane, supra, 339 U.S. at 320.

In the current matter, the City seeks protection by relying on the strict notice provisions of the LRHL by contending that notice of the Council and Planning Board Hearings was published in a local newspaper. This runs contrary to the holdings in Mullane as well as Schroeder because Iron Mountain's identity and tenancy was well known to the City and Planning Board. The Redevelopment Investigation Report directly references the property located at Block 159 Lot 11 as being the "Iron Mountain Storage Facility." (Pa193). This clearly demonstrates that Defendants knew the identity and whereabouts of Iron Mountain for purposes of providing notice. Moreover, the City determined Block 159 should be designated as being an area in need of redevelopment in accordance with N.J.S.A. 40A:12A-5(e) which provides that the property lacks proper utilization. An affirmative finding under this section of the LRHL required the City and Planning Board to have investigated the tenancy of the Subject Property. Any investigation would have revealed the identity and property interest maintained by Iron Mountain. Moreover, the City would have to conduct a Workable Relocation Assistance Plan prior to moving forward with its redevelopment. N.J.S.A. 20:4-7.(Pa89-90). This would have identified the status of the tenancies in the redevelopment area. Accordingly, the burden that the City claims it would suffer were this Court to decide that Iron Mountain and other similarly situated tenants

should have received personal notice is nothing short of a spurious argument as the tenancies were known or reasonably ascertainable. Mullane, supra, 339 U.S. at 318.

The holding in Mullane was extended and applied to a condemnation action by the Second Circuit in Brody. There the court held that the notice provisions of New York's Eminent Domain Law violated a property owner's due process right to notice with respect to whether the proposed redevelopment constituted a "public use" so as to justify the acquisition of plaintiff's property. In relying on Mullane, the Court held that notice must be "reasonably calculated under all circumstances, to apprise all interested parties" of an action to take their property. Brody, supra, 434 F.3d. at 130. A review of Iron Mountain's status as a commercial tenant with an option to purchase in its lease indicates that it is such an interested party. State v. Jan-Mar, Inc., 236 N.J. Super. 28 (App. Div. 1989).

The City mistakenly asserts that the holding in Jan-Mar, "has no bearing on the facts of this case." (Db at 7). However, the holding in Jan-Mar as well as the out of state cases cited therein, clearly supports Iron Mountain's position that a lessee who possesses an option to purchase in the lease maintains an interest in property. Such an interest, gives Iron Mountain the right to receive notice and participate in the redevelopment

process as well as to object to the blight declaration on the grounds that it is not supported by substantial evidence. Gallenthin Realty Development, Inc. v. Borough of Paulsboro, 191 N.J. 344 (2007). This holding is also recognized in the leading treatise on Eminent Domain, *Nichols* §5.02, which provides that "a lessee under a lease containing an option to purchase is an owner within the meaning of the statute." This contradicts the Appellate Division's holding that Iron Mountain merely possessed a contractual right rather than a property right.

Jan-Mar must be read in conjunction with the holdings in Mullane, Schroeder, and Brody. When done so, it is clear that Iron Mountain's option to purchase in its lease creates a property right which mandates that it receive personal notice of the redevelopment process.

POINT II

IRON MOUNTAIN'S PETITION PRESENTS A QUESTION OF GENERAL PUBLIC IMPORTANCE AND THE INTEREST OF JUSTICE REQUIRES THAT CERTIFICATION BE GRANTED R. 2:12-4.

The far reaching effects of the Appellate Division's ruling will result in a deprivation of due process for all lessees who maintain a property right such as Iron Mountain has here. Moreover, the Appellate Division's decision disregards the fundamental principle that the taking of private property "for the purpose of conferring a private benefit on a particular private party" is unconstitutional. Kelo v. City of New London,

Conn., 545 U.S. 469, 477 (2005). Iron Mountain maintains the taking of the Subject Property is only for the benefit of the Edison Properties and thus prohibited. (Id.). Iron Mountain stands to lose its premises due to an improper land swap agreement between the Defendants and Edison a private third party developer. Where the real purpose of a condemnation is something other than the stated purpose as is the case here, than such a condemnation or blight designation should be set aside. Twp. Of West Orange v. 769 Assocs., L.L.C., 172 N.J. 564, 578 (2002). The Appellate Division failed to take this into consideration when applying the three prong test set forth in Matthews v. Eldridge, 424 U.S. 319 (1976). This is of significance because the land swap agreement could result in a sale of the property by the owner, the Berkowitz Company, without a condemnation ever occurring. Such a scenario would deprive Iron Mountain of the protections that the Appellate Division envisioned it has, i.e. the right to challenge the blight designation as a defense to a future condemnation action.

Were the courts below to have permitted Iron Mountain to have proceeded with its challenge there is no dispute that the blight designation would have been invalidated. This is based on the lack of substantial evidence and the numerous material discrepancies contained in the Redevelopment Investigation Report. (Pa193-195). The City has never provided any evidence

that the Subject Property maintains conditions which are detrimental to the safety, health, morals, or welfare of the community or that it is underutilized. N.J.S.A. 40A:12A-5(d)-(e). The City also ignores the findings of Plaintiff's expert Peter Steck, P.P., who concluded that no substantial evidence existed to support the blight designation. (Pa173). Instead of responding to these critical issues, the City attempts to draw the Court's attention to numerous arguments which have no merit and/or bearing on the current petition.

With respect to the City's allegation that an expansion of the forty-five days is unwarranted, there is no evidence that Iron Mountain intentionally or negligently delayed filing its complaint. The only explanation is that Iron Mountain was not provided with notice. As noted by the City, R. 4:69-6(c) provides for a relaxation of the forty-five day time limit where the "interest of justice so requires." However, The City argues that the current matter does not provide the circumstances required to enlarge that time period. The City's position stands directly at odds with the holding in Derose in which the Appellate Division held:

> that the legitimacy of the blight designation is of sufficient public importance to warrant an enlargement of that time, and merits consideration See Concerned Citizens of Princeton, supra, 370 N.J.Super. at 447; Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). The multiple defects of notice in this case fortify that conclusion.

DeRose, supra, 398 N.J. Super. at 418.

Furthermore, the right to challenge a municipality's action should not accrue until the challenger is apprised that it is being deprived of some right. See Dolente v. Borough of Pine Hill, 313 N.J. Super. 410, 417-418. (App. Div. 1998).

In the current matter, having the forty-five days run from the date the City Council declared the area to be in need of redevelopment without informing Iron Mountain is unjust. Brody, supra, 434 F.3d. at 130. The fact remains that there was no justifiable reason for Plaintiff to initiate legal proceedings until it learned of the true intentions of the Defendants to deprive it of its use and enjoyment of the Subject Property. The Redevelopment Plan categorized the Subject Property as being an "optional site" and all of the conceptual drawings in the Plan depicted that the Iron Mountain Building would remain in existence. (Pa274-285). The Redevelopment Plan indicated that zero properties on Block 159 would require relocation. (Pa287). Based on these representations, the only reasonable conclusion was that Iron Mountain would continue its occupation and use of the building.

The City has failed to provide this Court with a response to the apparent conflict which exists between the Appellate Division's decision in the current matter with that of their

holding in Dutch Neck Land Co., L.L.C. v. City of Newark, 2008 WL 2026506 (App. Div. 2008). In Dutch Neck, the Appellate Division permitted a challenge to the City's blight designation decades after its approval. The Appellate Division allowed for an expansion of the forty five days by holding that the interests of judicial economy dictated that the challenges to blight designation and redevelopment plan be resolved in the prerogative writ action, "rather than tabling those issues for a later eminent domain proceeding." Id. at *11.

The City's argument that Iron Mountain has no proof that it did not receive notice is similarly misplaced. The City seeks to have Iron Mountain prove a negative. This argument is at best disingenuous in light of the fact that it is the City which possesses the notices that went out to those affected by the redevelopment. If the City had proof that Iron Mountain had received notice than it certainly would have come forward and presented such evidence to this Court and/or any of the Courts below.

The City's allegations of waiver are yet another example of the City conjuring up arguments which have no bearing on this petition. For the first time in the course of this litigation, the City argues that the Plaintiff has waived its right to challenge the blight designation on constitutional grounds because such relief was not sought in the First Amended

Complaint. The City correctly notes that Plaintiff's original complaint alleged that the Defendants' actions deprived Iron Mountain of its right to substantive due process. The Trial Court found this argument to be time barred and therefore dismissed this claim while never addressing the merits. The Trial Court did however allow Plaintiff to file an amended complaint challenging the redevelopment plan because such challenge was timely. As such, based on the Trial Court's ruling Plaintiff would not have repeated the same exact allegations in its amended complaint. Notwithstanding, a review of the First Amended Complaint shows that Iron Mountain did proffer a constitutional challenge to the taking and inclusion of the property in the redevelopment area. (Pa297 at ¶¶26-27). Accordingly, the City's argument to the contrary is without merit.

CONCLUSION

For the aforementioned reasons, Iron Mountain's petition for certification should be granted.

Respectfully submitted
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Dated: May 4, 2009