

Prepared and filed by the court.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION:HUDSON COUNTY  
DOCKET NO. HUD-L-884-17

Jersey City Redevelopment Agency,

CIVIL ACTION

Plaintiff,

v.

ORDER

297 Communipaw Avenue, LLC,

Defendant.

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297 Communipaw Avenue, LLC,

Third-Party Plaintiff,

v.

Point Capital Development, LLC,

Third-Party Defendant.

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This matter having come before the court on April 13, 2017, by verified complaint and order to show cause, and the court having conducted a plenary hearing on November 15, 2017, and good cause appearing for the entry of the within order,

IT IS ON THE 10<sup>TH</sup> DAY OF JANUARY, 2018,

ORDERED AND ADJUDGED that plaintiff's verified complaint is dismissed for the reasons set forth in the attached opinion; and

IT IS FURTHER ORDERED that defendant's counterclaim and third-party complaint shall proceed in the normal course.

This order shall be uploaded in eCourts.

A handwritten signature in black ink, appearing to read "Peter F. Bariso, Jr.", enclosed within a rectangular box.

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Hon. Peter F. Bariso, Jr., A.J.S.C.

NOT TO BE PUBLISHED WITHOUT  
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
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Charles Dennen, James Graziano, (Archer & Greiner, PC) for  
Plaintiff, Jersey City Redevelopment Agency

Jennifer Borek, Lawrence Bluestone, (Genova Burns, LLC) for  
Defendant/Third-Party Plaintiff, 297 Communipaw Avenue, LLC

John Curley, Jason Hyndman, (John J. Curley, LLC) for Third-  
Party Defendant, Point Capital Development, LLC

### **Statement of Facts and Procedural History**

This matter arises out of a condemnation action brought by the Jersey City Redevelopment Agency ("JCRA") for the acquisition of 239 Suydam Avenue, Jersey City, New Jersey, Block 20304, Lot 39 ("Lot 39").

JCRA is an autonomous agency which is authorized under the New Jersey Redevelopment Act, the Abandoned Properties Rehabilitation Act, and the Local Redevelopment and Housing Law to acquire property located within redevelopment areas.

JCRA brought this condemnation action as a part of its redevelopment plan adopted in March of 1999. Lot 39 is owned by defendant/third-party plaintiff, 297 Communipaw Avenue LLC. ("Communipaw").

Prior to March 1999, The City of Jersey City designated the subject property as part of an area in need of redevelopment ("Redevelopment Area"). The Redevelopment Area comprises the entirety of Block 20304. The condemnation is intended to further a redevelopment project ("project") to build a 250-300 unit building complex in the Redevelopment Area. Lot 39 is .04 acres totaling 1,699 square feet. Communipaw owns all but one of the lots in the Redevelopment Area, and two additional adjacent lots. JCRA has not instituted condemnation proceedings for the remaining lots in the Redevelopment Area.

A majority of the Redevelopment Area was owned by Importer Services Corporation ("ISC") and used as a factory. The remaining properties were two former residential lots, lot 34 and 35 as well as an active residential lot, Lot 39. In January 2015, Point Capital Development, LLC ("PCD") made an offer to purchase the ISC factory site for \$5,640,000, but ISC rejected the offer. The residential lots were foreclosed on by Crown Bank on October 15, 2015.

The Board of Commissioners for JCRA passed a resolution naming PCD the designated redeveloper for Block 20304 on May 19, 2015. On September 14, 2015 JCRA and PCD finalized the redevelopment agreement. On September 25, 2015 PCD sent the ISC an offer to buy the site for \$5,000,000. ISC rejected the offer and contended that the offer was not made in good faith since it was \$640,000 less than PCD's previous offer. On December 3, 2015 PCD requested that JCRA condemn the ISC Site. On December 9, 2015 PCD emailed JCRA requesting that JCRA begin the process of relocating the residents on Lot 39. On December 21, 2015 JCRA sent a pre-acquisition notice to ISC, expressing JCRA's intent to condemn the site. On April 14, 2016, at JCRA's request, Phillips, Preiss, Grygiel, LLC. ("PPG") presented JCRA with a proposal to perform the Workable Relocation Assistance Plan ("Wrap") for the tenants on Lot 39. On April 25, 2016 JCRA awarded PPG with a contract to perform these services. No further action was taken by JCRA and ISC filed an inverse

condemnation complaint against JCRA on June 21, 2016. This matter was eventually dismissed by stipulation filed December 2, 2016.

On February 9, 2016 PCD wrote to Crown Bank offering \$250,000 for Lot 39 or \$300,000 if the lot could be delivered vacant. On March 15, 2016 ISC entered into a contract of sale with Bluestone Capital Group, LLC, an associate of Communipaw, for the purchase of the ISC site for \$6,800,000. Communipaw and ISC entered into an amended agreement and closed the sale on November 15, 2016. On July 16, 2016 Communipaw also purchased Lots 34, 35, and 39 from Crown Bank for \$4,500,000. There have been no condemnation actions brought against lots 34 or 35.

On October 3, 2016 JCRA sent a letter to Supaw Partners, LLC, who JCRA believed owned Lot 39, offering to purchase Lot 39 for \$365,000. On October 6, 2016 JCRA sent a similar offer letter to Communipaw. On October 14, 2016 Communipaw responded to the offer by requesting a copy of the appraisal and informing JCRA that it had purchased multiple properties in the area.

On December 16, 2016 Communipaw submitted an application to the Jersey City Planning Board for Preliminary Major Site Plan approval to construct a mixed-use development of the property. Communipaw presented two alternate designs to the Planning Board, one of which would conform to the exact specifications of the redevelopment plan.

On March 2, 2017 JRCA brought this action by filing a verified complaint and an order to show cause. Interestingly, on April 4, 2017 PPG emailed JCRA a memo estimating that the relocation process for the tenants located on Lot 39, would take approximately seven months. On April 6, 2017 a verified answer, counterclaim, and third-party complaint was filed by Communipaw contesting the condemnation action and seeking alternate relief. On April 13, 2017 a hearing was held where this court reviewed the map of the redevelopment project and questioned why JCRA picked a single parcel to condemn. Unsatisfied with JCRA's response this court granted limited discovery to determine whether the selection of a single parcel to condemn was done in bad faith.

An order dated April 20, 2017 permitted the parties to conduct limited discovery, in accordance with R. 4:67-5, on two issues: (1) whether JCRA adequately considered Communipaw's 108,580 square foot assemblage and; (2) whether JCRA acted in bad faith in only bringing a condemnation action for Lot 39 and not the rest of the property owned by Communipaw in the Redevelopment Area.

Following the completion of limited discovery a plenary hearing was held on November 15, 2017 where testimony was taken from John Fio Rito, the principal and founder of PCD, and David P. Donnelly, the executive director of JCRA.

Mr. Fio Rito testified as to the proposed building plan for the project. He identified, on a tax map of Block 20304 where the

project is to be developed, the two phases of the project, and noted the location of Lot 39 in relation to the rest of the project. Mr. Fio Rito informed the court that the project was initially planned to be developed in three phases, however after a survey was conducted it was determined that the total square footage of the ISC site was less than anticipated. This reduced the size of the project necessitating a revised development plan to be completed in two phases. Lot 39 is located in phase II of the revised development plan. Under the initial plan Lot 39 was located in phase III. Mr. Fio Rito also detailed his role in attempting to purchase the property including his communications with his attorney and JCRA regarding the tenants located on Lot 39 and how he planned to proceed in regards to relocating the tenants. Mr. Fio Rito confirmed that PCD became aware that there were tenants occupying Lot 39 in July 2015. To date no contact has been made with the tenants.

Mr. Fio Rito also testified that in redevelopment projects relocating tenants can be slow, but since he has a portfolio of over 400 units in Jersey City he could relocate the tenants without getting overly excited.

Mr. Donnelly described the general process of how JCRA internally operates, condemns property, and works with outside contractors. Mr. Donnelly went on to describe the process by which JCRA began the condemnation proceeding upon Lot 39. He described



JCRA's concerns with Lot 39 because it was a residential property. To date no request for access has been made for Lot 39 and there have been no efforts to relocate the residents outside of the initial contract signed April of 2016 with PPG. PPG has not begun the WRAP process nor made any demonstrable efforts to make contact with the residents.

The limited issue that is now before the court is whether or not JCRA condemning the single parcel of Lot 39 was arbitrary and capricious or done in bad faith.

#### **JCRA's Argument**

JCRA first states that they have the authority to take the subject property. As to the issue of good faith JCRA asserts that when an entity exercises its power of eminent domain courts generally presume that the condemnation is valid and give that determination great deference. Taxpayer Assn. of Weymouth Twp. V. Weymouth Twp., 71 N.J. 249, 264 (1976). There must be an affirmative showing of bad faith, fraud or manifest abuse, and the burden of proof is on the party claiming that the entity acted in bad faith by clear and convincing evidence. Twp. Of W. Orange v. 769 Assocs., 172 N.J. 564, 572 (2002).

The reason given by JCRA for only condemning Lot 39 is that JCRA intends to incorporate Lot 39 as part of a larger redevelopment plan. JCRA believes that the inability to acquire Lot 39 will mean the project will not be developed as planned. Lot

39 is the only occupied residence in the redevelopment project. It contains an occupied three-story multi-family residential building, which has three residential units. JCRA argues that the acquisition of an occupied residential unit for a public project triggers New Jersey state relocation laws and regulations, requiring certain assistance and notice requirements. Additionally, the relocation law and regulations require preparation of a WRAP that must be approved by the New Jersey Department of Community Affairs. JCRA states that occupants of residential properties often raise the strongest objections to condemnation and that if JCRA fails to acquire Lot 39 they will be unable to move forward with the rest of the redevelopment plan.

When JCRA began the process to acquire Lot 39, neither Lot 39 nor the ISC Site were owned by Communipaw. Communipaw purchased the property in July, 2016 after the plan to redevelop the site had already been approved. JCRA questions whether Communipaw reasonably could have believed it was possible to undertake a project at this location. To back up this contention JCRA states that Communipaw, upon acquiring the ISC site, rushed to file a plan for site approval and proposes this could have been to intimidate JCRA to stop the redevelopment plan.

JCRA in its post preliminary hearing brief reasserts that while Communipaw may not like the decision to condemn Lot 39, it has failed to show that the decision was arbitrary and capricious,

or based on an improper motive. JCRA also reasserts that Lot 39 is the only residential property located in the project and that in its experience residential properties often raise the strongest objections to the condemnation. In reference to the preliminary hearing JCRA argues that because the location of lot 39 changed from phase III to phase II it is now more urgent that the property be condemned first so that the rest of the project can go forward.

JCRA further argues that although they have not acted to relocate the residents or gain access to Lot 39 since they hired PPG in April of 2016, that this was simply an oversight or an unfortunate case of something falling through the cracks and that the lack of an effort to relocate the residents does not indicate bad faith.

#### **PCD Argument**

PCD largely restates the argument made by JCRA. They address that they have already successfully developed an 83-unit residential building located across the street from the subject property and that they were designated as the redeveloper of the subject property on May 19, 2015. They reiterate that Communipaw purchased the properties within Block 20304 which includes Lot 39 with the knowledge that PCD had been designated as redeveloper and was in the process of acquiring the property. PCD states that it believed that Lot 39 could be voluntarily acquired, but that the

foreclosure process was more complex than PCD had originally believed.

PCD requested in May of 2016 that JCRA shift its focus from acquiring the larger ISC site to acquiring Lot 39. At that point in time there was no hint that the ISC parcel and Lot 39 were unified in ownership and that pursuing the entire parcel would have been illogical.

PCD asserts that after exchanging written discovery and a preliminary hearing Communipaw has failed to adduce any affirmative evidence of bad faith by JCRA in condemning Lot 39.

#### **Communipaw Argument**

Communipaw states that JCRA and PCD falsely contend that JCRA initiated the condemnation of Lot 39 separate from the other lots because of the need to relocate the tenants and that implicit in this justification is the apparent desire to eventually condemn all of the parcels in the Redevelopment Area.

Communipaw first contests JCRA's claim that they are bringing the condemnation action for Lot 39 because of residential tenants since discovery revealed no evidence that this was considered before JCRA initiated the condemnation.

Communipaw asserts that JCRA's actions can only be explained as a set of favors that were done for PCD as the developer. The

real purpose JCRA has brought this condemnation action for Lot 39 is to split the property in half to decrease its value.

The majority of the Redevelopment Area was previously owned by a single entity, ISC. PCD had attempted to purchase the property, but was unable to do so. Communipaw spent \$6.5 million on the ISC property and an additional \$4.5 million on acquiring Lots 34, 35, and 39. Communipaw states that PCD only has a budget of \$5 million and could not afford to purchase the subject property so they had JCRA condemn Lot 39 to decrease the value of the subject property. In this action JCRA has only condemned 1.8% of the total Redevelopment Area and 1.5% of the land owned by Communipaw, which includes two parcels that are adjacent to the Redevelopment Area.

Communipaw has submitted a site plan application to develop the project on the land that it has acquired and claims that by condemning Lot 39 Communipaw's interests are split in half preventing it from pursuing its own development project.

Communipaw also states that this is not the first time JCRA has helped PCD. In April, 2015 Liberty Park Village made an offer of \$6.5 million to ISC to purchase a portion of the land in the redevelopment area. ISC and Liberty Park entered into a contract of sale in May, 2015. On April 13, 2015 PCD applied to JCRA to be designated as the developer of the Redevelopment Area and the agreement was executed on September 14, 2015. PCD made an initial offer of \$5,640,000 and a subsequent offer of \$5,000,000 to ISC.

On December 21, 2015 JCRA sent a pre-acquisition notice to ISC, indicating JCRA's intent to condemn the site.

Communipaw claims that it only found out about PCD's designation after it began discussion with ISC's lawyers and that it purchased that land not knowing whether JCRA would in fact start condemnation proceedings. They further state that JCRA was not in the process of instituting a condemnation proceeding since it had not obtained a final appraisal for the ISC site or taken any action since 2015.

Communipaw argues that JCRA and PCD have not identified a single document in which the rational of condemning Lot 39 because of the residents on the property is discussed or explained. The evidence shows that PCD assumed from the beginning that Lots 1 and 39 would be acquired after the acquisition of the condemnation of the ISC site.

Additionally, Communipaw states that JCRA has failed to take any action to begin the relocation process despite PCD having requested JCRA to begin the process in December of 2015. In April 2016, JCRA retained PPG to assist with the relocation of the residents, but no other steps have been taken in the process. Communipaw contends that if JCRA began the relocation process immediately that the process would have been completed by now. PPG's memo to JCRA stated that the relocation process would only take seven months, and this timeframe has not been disputed.

Communipaw argues that both Mr. Fio Rito and Mr. Donnelly have previously certified that failing to condemn Lot 39 could prevent PCD from completing its proposed redevelopment project. However, Mr. Fio Rito's testimony directly casts doubt on the credibility of this alleged justification for the condemnation. When PCD realized that the total area of the Redevelopment Area was less than it originally believed, the plan was changed from three phases to two phases. Additionally, Mr. Fio Rito confirmed that because of the size of the Redevelopment Area a viable project could be completed with a portion of the ISC site which did not include Lot 39, meaning the condemnation of Lot 39 was not an immediate concern. Communipaw further argues that Mr. Fio Rito's testimony revealed that PCD lacked the financial ability to purchase the entirety of the ISC Site.

### **Legal Conclusion**

There is a presumption that when an entity brings an eminent domain action, that the action is valid and the determination to bring the action will be given a significant amount of deference. Riggs v. Long Branch Twp., 109 N.J. 601, 612 (1988). The party that is challenging the entity's use of eminent domain, through an allegation of bad faith, has the burden of proving that bad faith by clear and convincing evidence. Reddington v. Solberg Aviation, 409 N.J. Super. 282, 311 (App. Div. 2009). Bad faith is typically

described as the doing of an act for a dishonest purpose or with the state of mind to affirmatively operate with a furtive design or some motive of interest or ill will. Ibid. However, bad faith is not always borne of ill will or a dishonest purpose, but can also exist from a reckless indifference to significant facts. N.J. Title Ins. Co. v. Caputo, 163 N.J. 143, 156 (2000).

Although the public purpose for taking the land may be valid, if the true reason for the taking is beyond the power conferred by law, the condemnation may be set aside. Borough of Essex Fells v. Kessler Inst. for Rehab., Inc., 289 N.J. Super. 329, 338 (Law Div. 1995). In other words, public bodies may not condemn to disguise an ulterior motive or act with improper motives. Ibid.

When the real purpose of a condemnation is different than the stated purpose or the condemning authority acted in bad faith the court may set aside the condemnation. Casino Reinvestment Dev. Auth. V. Danin, 320 N.J. Super. 342, 357 (Law. Div. 1998). The condemning authority also has an overriding obligation to deal forthright and fairly with property owners. F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426 (1985). Government officials when dealing with the public must turn square corners and conduct itself with integrity. Ibid.

This court concludes that JCRA acted in bad faith by only condemning Lot 39 demonstrated by its failure to take any significant action to relocate or even contact the residents on



Lot 39. There was no reasonable basis established for JCRA to only condemn Lot 39 when they plan on condemning the larger property at a later date. JCRA's claim that uncertainty over the ownership of Lot 39 led in part to delays in attempting to relocate the tenants is baseless because the ownership of Lot 39 is irrelevant to relocation efforts.

JCRA claims that it believes the inability to acquire Lot 39 will mean the project will not develop as planned, yet they fail to provide any reason why they would not be able to acquire Lot 39.

Additionally the April 4, 2017 memo from PPG estimated that the relocation process would take seven months. Since this was not disputed, if WRAP procedures were initiated when PPG was originally hired as a consultant on April 25, 2016 the process would have been completed by the end of November 2016.

JCRA and PCD's position that acquiring Lot 39 is essential to the redevelopment project proceeding was directly contradicted by Mr. Fio Rito's testimony that he had a portfolio of over 400 units in Jersey City and would be able to move the tenants into one of those locations without "getting overly excited about it." (Tr. 22:25-23.3.)

This court does not find Mr. Donnelly's claim that the relocation proceedings have not gone forward because of an oversight on his part to be persuasive. Mr. Donnelly has extensive

experience in this field and for him to take the position that the relocation of the tenants at Lot 39 was of such vital importance to the redevelopment project, while at the same time asserting that no real efforts have been made to relocate or even contact the residents since JCRA became aware of their presence in July 2015, was an oversight is inconstant and unacceptable. In fact JCRA could have begun the relocation process as early as May 2015. (Tr. 87:6-89:2).

JCRA has failed to show any rational basis as to why Lot 39 should be condemned before the rest of the property in the Redevelopment project. JCRA has not turned square corners and dealt forthright and fairly with Communipaw. F.M.C. Stores, 100 N.J. at 426. Although Communipaw has not affirmatively shown an alternative purpose for the condemnation of Lot 39 by clear and convincing evidence it has shown that there was no reasonable basis for the stated purpose. Casino Reinvestment, 320 N.J. Super. at 357. The courts should not enforce a condemnation when "there is a plain case of abuse of discretion in the exercise of the power." Burnett v. Abbott, 14 N.J. 291, 295 (1954).

Further, this court finds the analogy to bad faith in insurance cases persuasive. An insured can prove that the insurance company acted in bad faith if it can show that there was no reasonable basis or any good faith basis for the insurance company's actions. Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 604 (2015); Pickett

v. Lloyd's (A Syndicate of Underwriting Members), 131 N.J. 457 (1993). Bad faith need not be borne of ill will or sinister implications, but can also be present from a reckless indifference to apparent facts. N.J. Title Ins. Co. v. Caputo, 163 N.J. 143, 156 (2000).

JCRA's decision to condemn Lot 39 alone, in light of its failure to substantially begin the relocation process for the tenants located there, was arbitrary and capricious. Given the lack of any reasonable basis for making this decision or acting to relocate the tenants despite having the capacity to begin the relocation process as early as May 2015 makes the decision to condemn Lot 39 arbitrary and capricious and establishes bad faith.