

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

UNITED STATES OF AMERICA : CIVIL ACTION

:

v. :

:

35.87 ACRES OF LAND, MORE OR LESS, :

KNOWN AS TRACTS 24 AND 24-I LOCATED :

IN THE COMMONWEALTH OF PENNSYLVANIA, :

DELAWARE COUNTY, BOROUGH OF PROSPECT :

PARK AND NORWOOD, SITUATED ABOUT :

2.3 MILES WEST OF PHILADELPHIA :

INTERNATIONAL AIRPORT, NORTH OF DARBY :

CREEK, SOUTH OF CHESTER PIKE 13, DARBY :

REALTY CO., INC., et al. : NO. 98-2177

MEMORANDUM AND ORDER

HUTTON, J. May 25, 1999

Presently before the Court are the Defendants' Motion for Partial Summary Judgment and to

Compel the Filing of a Declaration of Taking, the Payment of Estimated Just Compensation and to Challenge Plaintiff's Estimate of Just Compensation with Supporting Affidavits ("Motion to Compel") (Docket No. 49), the Government's Consolidated Opposition to Defendants' Motion for Partial Summary Judgment and Motion to Compel Filing of Declaration of Taking and Payment of Just Compensation (Docket No. 50), the Defendants' Response to the Government's Consolidated Opposition to the Defendants' Motion (Docket No. 51), the Government's reply thereto (Docket No. 52), and the Defendants' reply thereto (Docket No. 53). For the reasons stated below, the Defendants' Motion to Compel and Motion for Partial Summary Judgment is **DENIED**.

I. BACKGROUND

This case involves a condemnation action initiated by the United States Government, acting through the Fish & Wildlife Service of the Department of the Interior ("Government," "United States" or "Plaintiff") against the property owners of the property subject of the instant condemnation action ("Defendants"). In the present motion, the Defendants move the Court for partial summary judgment for eight hundred seventy-five thousand (\$875,000.00) dollars plus interest. In the alternative, the Defendants request a hearing to determine a fair and good faith estimate of just compensation, and move for an Order requiring Plaintiff to file a Declaration of Taking and make payment of just compensation as determined plus interest.

Taken in the light most favorable to the nonmoving party, the facts are as follows. On April 24, 1998, the Government filed a Complaint of Condemnation ("Complaint"). The authority for the filing of the Complaint was 40 U.S.C. 257. That same day, a Notice of Condemnation was filed by the Government. The land at issue in the Complaint is adjacent to the John Heinz National Wildlife Refuge at Tinicum. The property at issue constitutes approximately 35.87 acres, composed of two tracts, commonly referred to as Tract 24 and Tract 24-I (collectively, the "Property"). The purpose of condemning the Property was "for the benefit of fish and wildlife trust resources and enjoyment of the public." On May 14, 1998, the Government filed a Lis Pendens Notice with the Court. On May 19, 1998, the Court issued a Decree directing the Prothonotary of Delaware County, Pennsylvania to enter the Notice of Lis Pendens.

The Complaint filed by the Government in April of 1998 was not the first litigation concerning this property. On June 7, 1996, Robert Jackson, counsel to Darby Realty Company, Inc. and Fay L. Goodman, owners of the property, filed a "Petition for the Appointment of Viewers" against the United States Fish & Wildlife Service ("USF&W"), in the Court of Common Pleas of Delaware County. The petitioners (Defendants here) generally alleged that the USF&W had substantially deprived them of all beneficial use and enjoyment of their property. The Defendants alleged that these activities included statements that the Property was to be acquired by the United States Fish and Wildlife Service ("USF&WS"), listing the Property on the acquisition list of the USF&WS, statements by USF&WS personnel indicating that they intended to acquire the Property, and interference with Defendants' attempt to challenge a local zoning ordinance or sell the Property. The Defendants also alleged that the USF&WS failed to file a declaration of taking.

In response to the Petition, the Government filed a Notice of Removal. In that Notice, the

Government noted that the Petition alleged an inverse condemnation action. The Notice alleged that removal of the inverse condemnation to federal court was warranted. The Government explained that the sole remedy for an inverse condemnation action such as the one filed by the landowners is under Tucker Act, 28 U.S.C. 1346 and 1491, and since such an action arises under federal law, the action can be removed to either United States District Court or the United States Claims Court, depending on the value of the claim. The Notice further stated that the District Court had concurrent jurisdiction over the matter provided the amount of Defendants' claim did not exceed \$10,000.

Subsequently, the parties entered into and the Court approved a Stipulation for Transfer, transferring the case to the United States Court of Federal Claims. The Stipulation that was signed by counsel for both parties states that "this matter involves a non-tort monetary claim against the United States in excess of \$10,000.00." The Stipulation further provides "[t]hat pursuant to the Tucker Act, 28 U.S.C. 1491, original jurisdiction over such claims exceeding \$10,000.00 rests exclusively in the United States Court of Federal Claims. On July 24, 1996, the Honorable Eduardo C. Robreno approved the Stipulation and ordered the action transferred to the United States Court of Federal Claims.

On July 1, 1998, Judge Robert J. Yock of the United States Court of Federal Claims entered an Order concerning Defendants' transferred inverse condemnation action. In his Order, Judge York noted that on July 11, 1998, "the parties filed a Joint Motion to Stay Proceedings pending a decision in the United States District Court for the Eastern District of Pennsylvania, United States v. 35.87 Acres of Land more or less, Civ.No. 98-CV-2177." The Order further states that "because the district court does not involve Declaration of Taking, therefore title to the land remains with the plaintiff [sic] until the district court renders judgment."

On September 30, 1998, counsel for Defendants filed their Entry of Appearance and Answer. The Answer states that "Defendant Darby Realty does not challenge the rights [sic] of the Government to condemn Defendant's [sic] property, however, Defendants do contend that they are entitled to payment of the estimated just compensation as the Government has already taken possession of their property." On November 12, 1998, the Defendants filed their Motion for Partial Summary Judgment, To Compel the Filing of a Declaratory of Taking, the Payment of Estimated Just Compensation, and to Challenge Plaintiff's Estimate of Just Compensation With Supporting Affidavits ("Motion to Compel and Motion for Partial Summary Judgment"). The Government filed its response thereto on November 30, 1998. The Defendant then filed a response to the Government's response to their motion on December 11, 1998. The Government filed a reply thereto on January 28, 1999. Finally, on February 22, 1999, the Defendants filed a response to the Government's reply to the Defendants' response to the Government's first response to their motion.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the

basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Motion to Compel

In their Motion to Compel, the Defendants ask this Court to Order the Government to file a declaration of taking action and to deposit \$875,000 with the Court as just compensation for Defendants' Property. Not only is the Defendants' motion procedurally deficient, this Court is unaware of any legal authority to support the Defendants' Motion to Compel.

1. Straight-Condensation Action

Four methods are available by which the United States can exercise its power of eminent domain. These four methods are outlined in the Supreme Court's decision in Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984). The most frequently used is the so-called "straight-condemnation" procedure prescribed in 40 U.S.C. 257. Under that statute, an "officer of the Government" who is "authorized to procure real estate for the erection of a public building or for other public uses" makes an application to the Attorney General who, within 30 days, must initiate condemnation proceedings. The form of those proceedings is governed by Federal Rule of Civil Procedure 71A. In brief, Rule 71A requires the filing in federal district court of a "complaint in condemnation," identifying the property and the interest therein that the United States wishes to take, followed by a trial--before a jury, judge, or specially appointed commission--of the question of how much compensation is due the owner of the land. The practical effect of final judgment on the issue of just compensation is to give the Government an option to buy the property at the adjudicated price. Danforth v. United States, 308 U.S. 271, 284 (1939). If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States. If the Government decides not to exercise its option, it can move for dismissal of the condemnation action. Ibid.; see Fed. R. Civ. P. 71A(I)(3).

A more expeditious procedure is prescribed by 40 U.S.C. 258a. ⁽¹⁾ That statute empowers the

Government, "at any time before judgment" in a condemnation suit, to file "a declaration of taking signed by the authority empowered by law to acquire the lands [in question], declaring that said lands are thereby taken for the use of the United States." The Government is obliged, at the time of the filing, to deposit in the court, "to the use of the persons entitled thereto," an amount of money equal to the estimated value of the land. (2) Title and right to possession thereupon vest immediately in the United States. In subsequent judicial proceedings, the exact value of the land (on the date the declaration of taking was filed) is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference. (3)

The Government's selection amongst and implementation of these various methods of acquiring property is governed, to some extent, by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* That statute enjoins federal agencies, *inter alia*, to attempt to acquire property by negotiation rather than condemnation, and whenever possible not to take land by physical appropriation. 4651(1), (4), (8). In addition, the statute requires a court with jurisdiction over a condemnation action that is dismissed or abandoned by the Government to award the landowner an amount that will reimburse him for "his reasonable costs, disbursements, and expenses" incurred in contesting the suit. 4654(a). The statute does not, however, regulate decisions by the Government whether to employ the "straight-condemnation" procedure prescribed in 257 or the "declaration of taking" procedure embodied in 258a.

2. Analysis

In the present action, the United States has elected to file a declaration action authorized by 40 U.S.C. 257 (1986). The federal condemnation statute gives the government the power to condemn any property that Congress has authorized it to acquire. *See* 40 U.S.C. 257 ("In every case in which ... any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for ... public uses, he may acquire the same for the United State by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so....").

Defendants' Motion to Compel is procedurally deficient in that it fails to comply with the requirements of Rule 71A(e). Rule 71A "govern[s] the procedure for the condemnation of real and personal property under the power of eminent domain." Rule 71A(e) provides in full part that:

If a defendant has no objection or defense to the taking of the defendant's property, the defendant may serve a notice of appearance designating the property in which the defendant claims to be interested. Thereafter, the defendant shall receive notice of all proceedings affecting it. If a defendant has any objection or defense to the taking of the property, the defendant shall serve an answer within 20 days after the Service of notice upon the defendant. The answer shall identify the property in which the defendant claims to have an interest, state the nature and extent of the interest claimed, and state all the defendant's objections and defenses to the taking of the property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not the defendant has previously appeared or answered, the defendant may present evidence as to the amount of the compensation to be paid for the

property, and the defendant may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed.

Fed. R. Civ. P. 71A(e). Under the plain language of the statute, the Defendants have waived any and all objections or defenses to this condemnation action. Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566, 569 (3d Cir. 1976). The Complaint was filed on April 24, 1998. The Defendants did not file and serve their Answer until September 30, 1998, over five months later. Obviously, this filing did not comply with the time set forth in Rule 71A(e) and that 20-day deadline is not subject to enlargement. See, e.g., United States v. Undivided 1-7th Fee Simple Interest in 0.43 Acre In Franklin County, 304 F. Supp. 1241, 1244 (E.D. Tenn. 1969); United States v. 4,724 Acres of Land, 31 F.R.D. 290, 291 (E.D. La. 1962); United States v. 1,108 Acres of Land, 25 F.R.D. 205, 207 (E.D. N.Y. 1960). As such, Defendants have waived all of the objections set forth in their Answer. This result works no prejudice to Defendants, as Rule 71A(e) provides that Defendants who waive defenses and objections, still have the opportunity at trial to "present evidence as to the amount of the compensation to be paid for the property." Fed. R. Civ. P. 71A(e).

Moreover, Defendants' Motion to Compel must fail for substantive reasons as well. As recognized by a unanimous Supreme Court in Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984), by filing a "straight condemnation" action under 257, the United States retains the "option" to purchase the property after the value of the property has been adjudicated. Kirby, 467 U.S. 1, 4. "If the Government wishes to exercise that option, it tenders payment to the private owner, whereupon title and right to possession vest in the United States." Id. Should the Government determine "not to exercise its option, it can move for dismissal of the condemnation action." Id. In a straight-condemnation action "the date of the taking must be deemed the date the United States tenders payment to the owner of the land." Id. at 11.

Defendants do not address this binding authority in their original Motion to Compel or in their subsequent pleadings. Instead, the Defendants rely on cases involving declaration of taking actions brought under 41 U.S.C. 258a⁽⁴⁾. Such reliance is baffling given that this action was filed under 40 U.S.C. 257, which authorizes the condemnation of private land by the United States. Title 41, U.S.C. 258a governs declarations of taking. Nothing in that statute grants a federal court authority to order the United States to file a declaration of taking.

The other alleged statutory basis for Defendant' Motion to Compel is the Uniform Real Property Acquisition Policy Act, 42 U.S.C. 4651. Defendants allege that the Government and its employees have violated or acted contrary to the requirements of the URPAPA. Courts consistently, however, have refused to exercise federal jurisdiction over claims that a property owners rights have been violated under the URPAPA. See, Will-Tex Plastics Mfg., inc. v. Dep't of Housing and Urban Dev., 346 F. Supp. 654, 658 (E.D. Pa. 1972 ("A reading of the various provisions of [URPAPA] leads to the conclusion that [URPAPA] did not intend to confer upon parties ... any right to obtain relief in the federal courts."), aff'd sub nom., 478 F.2d 1399 (3d Cir. 1973); Martinez v. Dep't of Housing and Urban Development, 347 F. Supp. 903, 904 (E.D. Pa. 1972) (legislative history "make[s] it abundantly clear that Congress expressly deprived the federal courts of jurisdiction to entertain actions to enforce the policies outlined). See also National Railroad Passenger Corp. v. Faber Enter., Inc., 931 F.2d 438, 443 (7th Cir. 1991);

United States v. 410.69 Acres of Land, 608 F.2d 1073, 1074 n.1 (5th Cir. 1979). Thus, URPAPA does not provide the authority for the Court to Order the United States to file a new separate civil action for a declaration of taking and Order the United States to pay \$875,000 in just compensation immediately. Because the Defendants have failed to present this Court with any applicable decisions or statutes to support the relief they seek, their Motion to Compel is denied.

B. Motion for Partial Summary Judgment

By their Motion to Compel, the Defendants also move for partial summary judgment. It is not possible, however, to determine precisely what judgment the Defendants seek. If they are asking that the Court rule in their favor that the United States has taken possession of their property and, therefore, they are eligible to bring an inverse condemnation action, such an order is beyond the jurisdiction of this Court. Rather, that issue properly resides in the United States Court of Federal Claims. Peduto v. City of North Wildwood, 878 F.2d 725, 726-27, 728 (3d Cir.1989); AT, Inc. v. United States, 24 F. Supp. 2d 399, 400 (M.D. Pa. 1998); 28 U.S.C. 1491. Likewise, if the Defendants are seeking the entry of a judgment of \$875,000 as preliminary just compensation, that relief can only be granted by the federal claims court, as it involves a claim against the United States over the statutory threshold of \$10,000.00. AT, Inc., 24 F. Supp. 2d 400; 28 U.S.C. 1491. The Defendants offer little assistance to the Court in clarifying this confusion.

If, however, the Defendants are seeking partial summary judgment under 40 U.S.C. 258a and 42 U.S.C. 4651, it is altogether another matter. To be granted partial summary judgment under Rule 56(c), the Defendants must demonstrate that they are entitled to judgment as a matter of law. Since the Defendants have not identified any applicable law that authorizes the relief they seek, see supra Part II.A.2, granting summary judgment would be improper. Moreover, this Court has already determined that the evidence before it establishes that the Government has commenced a "straight-condemnation" procedure prescribed in 40 U.S.C. 257. Any argument made by the Defendants to the contrary would amount to a genuine issue of material fact. Accordingly, Defendants' Motion for Partial Summary Judgment is denied.

An appropriate Order follows. (5)

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REALTY CO., INC., et al. : NO. 98-2177

ORDER

AND NOW, this 25th day of May, 1999, upon consideration of the Defendants' Motion for Partial Summary Judgment and to Compel the Filing of a Declaration of Taking, the Payment of Estimated Just Compensation and to Challenge Plaintiff's Estimate of Just Compensation with Supporting Affidavits ("Motion to Compel") (Docket No. 49), the Government's Consolidated Opposition to Defendants' Motion for Partial Summary Judgment and Motion to Compel Filing of Declaration of Taking and Payment of Just Compensation (Docket No. 50), the Defendants' Response to the Government's Consolidated Opposition to the Defendants' Motion (Docket No. 51), the Government's reply thereto (Docket No. 52), and the Defendants' reply thereto (Docket No. 53), IT IS HEREBY

ORDERED that the Defendants' Motion to Compel and Motion for Partial Summary Judgment is **DENIED.**

BY THE COURT:

HERBERT J. HUTTON, J.

1. Section 258a was enacted in 1931, for the principal purpose of enabling the United States, when it wished, peremptorily to appropriate property on which public buildings were to be constructed, making it possible for the Government to begin improving the land, thereby stimulating employment during the Great Depression. See H.R.Rep. No. 2086, 71st Cong., 3d Sess. (1930).
2. The owner is entitled to prompt distribution of the deposited funds. 40 U.S.C. 258a; Fed. R. Civ. P. 71A(j).
3. Congress also occasionally exercises the power of eminent domain directly. For example, when Congress thinks that a tract of land that it wishes to preserve inviolate is threatened with imminent alteration, it sometimes enacts a statute appropriating the property immediately by "legislative taking" and setting up a special procedure for ascertaining, after the appropriation, the compensation due to the owners. See, e.g., 16 U.S.C. 79c(b) (vesting in the United States "all right, title, and interest" in the land encompassed by the Redwood National Park as of the date of the enactment of the statute). In addition to these three statutory methods, the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner. See, e.g., United States v. Dickinson, 331 U.S. 745, 747-749, 67 S.Ct. 1382, 1384-1385, 91 L.Ed. 1789 (1947).
4. See United States v. C.M. Dow, 357 U.S. 17, 18 (1958) ("principal question" of case is when taking occurred, upon entry of possession by United States or filing of declaration of taking under 40 U.S.C. 258a); United States v. Herrero, 416 F.2d 945, 946 (9th Cir. 1969) (declaration filed by United States under 40 U.S.C. 258a), cert. denied, 397 U.S. 973 (1970); Stephenson v. United States, 33 Fed. Cl. 63, 66 (Fed. Cl. 1994) (action by United States under 40 U.S.C. 258a); Georgia-Pacific Corp. v. United States, 568 F.2d 1316, 1318 (Cl. Ct.) (declaration of taking), cert. denied, 439 U.S. 820 (1978); United States v. 1,060.92 Acres of Land, 215 F. Supp. 811, 811-12 (W.D. Ark. 1963) (declarations of taking filed in three separate suits).
5. In its Response to the Defendants' Motion to Compel and Motion for Partial Summary Judgment, the Government moves the Court to stay this action and grant the Government access to Defendants' Property to conduct environmental testing at Government expense. The Government fails, however, to provide the Court with any authority for such an Order. The Government is invited to file a motion in this regard in accordance with Local Rule 7.1(c), which provides in pertinent part that "[e]very motion not certified as uncontested ... shall be accompanied by a brief containing a concise statement of the legal contentions and authorities relied upon in support of the motion." E.D. Pa. R. Civ. P. 7.1(c).