

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

UNITED STATES OF AMERICA : CIVIL ACTION
 :
v. :
 :
48.86 ACRES OF LAND, MORE OR LESS :
KNOWN AS TRACTS 24, 24-I AND 35 :
LOCATED IN THE COMMONWEALTH :
OF PENNSYLVANIA, DELAWARE COUNTY :
BOROUGH OF PROSPECT PARK AND :
NORWOOD, SITUATED APPROXIMATELY :
2.3 MILES WEST OF PHILADELPHIA :
INTERNATIONAL AIRPORT, NORTH :
OF DARBY CREEK, SOUTH OF CHESTER :
PIKE ROUTE 13, DARBY REALTY CO. :
INC., et al. : NO. 98-2177

MEMORANDUM AND ORDER

HUTTON, J.

April 30 ,2001

Presently before this Court are Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 62), Defendants' Response to Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 63), Rely [sic] of the United States to Defendants' Response to Motion for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 64), United States' Motion in Limine that Defendants Have Waived Their Rights to Trial by Jury (Docket No. 68), Defendants' Response to the United States' Motion in Limine That Defendants Have Waived Their Rights to Trial by Jury (Docket No. 74), United States' Motion in Limine to Exclude Defendants'

Evidence Relating to Informal Wetlands Survey (Docket No. 70), Defendants' Response to the United States' Motion in Limine to Exclude Defendants' Evidence Relating to Informal Wetlands Survey (Docket No. 73), United States' Motion in Limine to Exclude Defendants' Evidence Unrelated to the Current Market Value of the Property (Docket No. 69), Defendants' Response to Plaintiff's Motion in Limine to Exclude Defendants' Evidence Unrelated to Current Fair Market Value of the Property (Docket No. 72), United States' Motion in Limine to Exclude Appraisal of Defendant's [sic] Expert, Kenneth P. Barrow, Jr. (Docket No. 71) and Defendants' Response to the United States' Motion in Limine to Exclude Appraisal of Defendants' Expert, Kenneth P. Barrow, Jr. (Docket No. 75). For the following reasons, the Motions are **DENIED in part and GRANTED in part.**

1. Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery

On September 8, 2000, an Order of this Court authorized a period of seventy-five days for discovery, ending on October 23, 2000. On October 5, 2000, the United States also served its Second Request for Production of Documents and Entry Upon Land. That request was pursuant to Federal Rules of Civil Procedure 34.¹

¹ Federal Rule of Civil Procedure 34(a) provides, in part, that "any party may serve on any other party a request . . . to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b)."

Defendants remained silent on the matter. As a result, the United States, on October 23, 2000, filed a motion for a court order authorizing expedited entry upon Defendants' property and enlargement of time for discovery.

Defendants contend that the their expert's development proposals

with the exception of the marina area, a permitted use in wetlands, did not interfere with the tidal wetlands or other wetlands. Any roads or the like which may be required for the development and which may involve wetlands are permitted as of right by applicable regulation. Accordingly, no reports relative to wetlands are attached to

their expert's proposal. See Defs.['] Response to Mot. of the United States for Court Order Authorizing Entry Upon Defs['] Property and Enlargement of Time for Discovery, at 3. Defendants also assert that the "proposed development of the property as described in their experts report, other than the permitted marina use, was not going to impermissibly interfere with the wetlands, therefore such reports are not necessary." See Defs.['] Response to Mot. of the United States for Court Order Authorizing Entry Upon Defs['] Property and Enlargement of Time for Discovery, at 4.

Plaintiff's motion this Court for an Order authorizing entry onto Defendants land because although Defendants' expert certifies that the highest and best use of the property at issue would be development, the expert does not analyze what impact the presence of the wetlands would have on such development. Plaintiff asserts that if the wetlands fall within the jurisdiction of the U.S. Corps

of Engineers, Defendants must apply for permits under § 404 of the Clean Water Act before taking any action that would adversely impact the wetlands. See Mot. of United States for Court Order Authorizing Expedited Entry Upon Defs['] Property and Enlargement of Time for Discovery, at 2. Plaintiff contends that this permit process is both lengthy and expensive and may result in rejection or substantial modification of a development plan, and require a mitigation of any damage to the wetlands on a one to one ratio. Thus, Plaintiff contends, these considerations have a major impact on the value of the property. The only way to determine whether jurisdictional wetlands exist on the property is to conduct a wetlands delineation survey. See id. at 3-4. Based on the stated relevance of this discovery request to the issue in this case, Plaintiff's motion is granted.

2. Motion in Limine that Defendants Have Waived Their Right to Trial by Jury

The United States filed its Complaint for Condemnation and Notice of Condemnation on April 24, 1998. In that Complaint, the United States requested a trial by jury. Defendants were served with a copy of the Complaint and Notice of Condemnation by and through their current counsel. Defendants did not respond to the Complaint in the period of time established by Federal Rule of Civil Procedure 71A(e). Defendants did not file their entry of appearance and Answer until September 30, 1998, some five months later. On February 3, 2000, the United States filed an Amended

Complaint and Amended Notice of Condemnation, in order to add a third tract to the property to be condemned. No jury demand was made in the Amended Complaint.

The United States now moves for a ruling in limine that Defendants have waived their rights to a trial by jury. Rule 71A, titled "Condemnation of Property," states "[t]he Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule." See Fed. R. Civ. P. 71A. A reading of Rule 71A reveals that the Rule is silent concerning the withdrawal of a demand for a jury trial. In such circumstances, the ordinarily applicable rules of procedure, if any, govern by operation of subsection (a) of Rule 71A. See, e.g., Kirby Forest, 467 U.S. at 18 (holding that landowner may move to amend award of compensation under Rule 60(b)); United States v. 416.81 Acres of Land, 525 F.2d 450, 455 (7th Cir.1975) (applying provisions of Rules 26(b)(4) and 37(a)(2) to land condemnation proceeding); United States v. Evans, 365 F.2d 95, 98 (10th Cir.1966) (finding that Rule 54(b) controls finality of judgment that does not resolve all claims in condemnation action); Cunningham, 246 F.2d at 333 (explaining that land commission must make findings of fact in accordance with provisions of Rule 52(a)). In this instance, Rule 71A(h), which deals with trial, is silent and by its silence, the Rule allows for the

application of the "general framework of the Federal Rules" Fed. R. Civ. P. 71A(a) advisory committee's notes, original report. 71A(h) does not address whether a party may simply withdraw its timely request for a jury trial without obtaining consent from the opposing party. Receiving no express guidance from the text of subsection (h), the Court looks to the other rules of procedure for an answer.

The Court looks to Federal Rule of Evidence 38, which governs the preservation of the right to a jury trial in other civil actions. Federal Rule of Civil Procedure 38 provides that "[a] demand for trial by jury made as herein provided may not be withdrawn without consent of the parties." See Fed. R. Civ. P. 38(d).

Here, the United States made a demand for a trial by jury within the time period provided by Rule 71A. The United States has not motioned this Court to withdraw its demand for a trial by jury. In light of these facts, the Court does not see the relevance of whether Defendants have waived their right to a trial jury because the United States has demanded a trial by jury that has not been withdrawn.

Even had the United States motioned this Court to withdraw its demand for a jury trial, it is clear from Defendants' submissions that it would not consent to such withdrawal. See Defs.['] Memo. of Law in Support of Defs.['] Opposition to the United States' Mot.

in Limine that Defs. Have Waived Their Right to Trial by Jury, at 1. Rule 38 requires consent of the parties before a demand for a jury trial can be withdrawn. Because Defendants' assert that such consent is not forthcoming, Plaintiff's motion in limine that Defendants have waived their right to a jury trial is denied on this alternative ground.

3. Motion in Limine to Exclude Defendants' Evidence Relating to Informal Wetlands Survey

On September 8, 2000, the parties entered into a stipulation that required that the parties identify their respective expert witnesses and exchange reports on September 18, 2000. Defendants did not identify a wetlands expert witness. Defendants were under the mistaken belief that because their wetlands expert was not going to be used as the Defendants' expert at trial, but may be used as a rebuttal witness, he need not be identified in discovery. Contra, Court's Order of September 8, 2000, ¶ 2 (stating parties stipulate and propose to Court that to assist with the orderly and efficient discovery in matter, parties agree to identify their expert witnesses and exchange appraisals and other expert reports concerning existence of contamination on property no later than September 18, 2000.)

The United States contends that any evidence relating to an analysis of wetlands on the property should be excluded. In response, Defendants note that their expert, Kenneth P. Barrow, does not intend to testify as an experts on wetlands, rather he

will testify as an expert on real estate and related matters. To the extent that this, or any expert, seeks to testify as an expert on wetlands, the United States' motion is granted because Defendants have failed to comply with Federal Rule of Civil Procedure 26(a)(2)(B). As a result, United States' Motion in Limine to Exclude Defendants' Evidence Relating to Informal Wetlands Survey is granted.

4. Motion in Limine Exclude the Appraisal of Defendants' Expert

The Court denies with leave to renew the United States' Motion in Limine to Exclude the Appraisal of Defendants' Expert because the Court has determined that a hearing is required to determine the admissibility of Defendants' expert's appraisal.

5. United States' Motion in Limine to Exclude Defendants' Evidence Unrelated to the Current Market Value of the Property

The United States seeks to exclude Defendants' reference to evidence unrelated to the current market value of the property. In particular, the United States seeks to bar the admission of testimony that "the United States Government, its agencies and employees, have interfered with [the Defendants'] ownership of the Property . . . and caused them financial harm." See Gov't Mot. in Limine to Exclude Defs.['] Evidence Unrelated to the Current Market Value of the Property, at 2. Although not specific as to the evidence of the particular conduct the United States seeks to have excluded, the United States' Motion indicates that it believes the Defendants will attempt to introduce evidence of inverse

condemnation or to raise a defense to the condemnation action. See Gov't Mot. in Limine to Exclude Defs.['] Evidence Unrelated to the Current Market Value of the Property, at 3-4. The United States believes such evidence is irrelevant to the fair market value of the property or will be used by Defendants' "to blame [the United States] for delays . . . and increase a valuation determination to punish the United States and reward the Defendants." See Gov't Mot. in Limine to Exclude Defs.['] Evidence Unrelated to the Current Market Value of the Property, at 5.

Defendants represent that they will not introduce evidence for the purposes suggested by the United States. Rather, Defendants posit that evidence of government conduct is relevant to demonstrate that the Defendants never developed the land because the land was going to be condemned. See Defs.['] Response to Pl.[s'] Mot. in Limine to Exclude Defs.['] Evidence Unrelated to the Current Market Value of the Property, at 2. Defendants' proposed use for the evidence is not for the improper purposes that the government suggests. Consequently, the United States' Motion is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 30th day of April, 2001, upon consideration of Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 62), Defendants' Response to Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 63), Rely [sic] of the United States to Defendants' Response to Motion for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery (Docket No. 64), United States' Motion in Limine that Defendants Have Waived Their Rights to Trial by Jury (Docket No. 68), Defendants' Response to the United States' Motion in Limine That Defendants Have Waived Their Rights to Trial by Jury (Docket No. 74), United States' Motion in Limine to Exclude Defendants' Evidence Relating to

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1. Motion of United States for Court Order Authorizing Expedited Entry Upon Defendants' Property and Enlargement of Time for Discovery is **GRANTED**. IT IS FURTHER ORDERED that Defendants shall permit the United States to enter upon the property at issue in this matter in order to conduct a wetlands survey within five (5) days of the date of this Order. IT IS FURTHER ORDERED that discovery shall be completed within sixty-five (65) days of the date of this Order.
2. Plaintiff's motion in limine that Defendants have waived their right to a jury trial is **DENIED**.
3. United States' Motion in Limine to Exclude Defendants' Evidence Relating to Informal Wetlands Survey is **GRANTED**.

4. United States' Motion in Limine to Exclude the Appraisal of Defendants' Expert is **DENIED with leave to renew.**
5. United States' Motion in Limine to Exclude Defendants' Evidence Unrelated to Current Fair Market Value of the Property is **DENIED.**

BY THE COURT:

HERBERT J. HUTTON, J.