

Condemning Municipalities Not Required to Negotiate With Mortgagees

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In Borough of *Merchantville v. Malik & Son, LLC* (A-3745-11T4), decided on February 5, 2013 and approved for publication, the New Jersey Appellate Division affirmed that the condemning municipality was only required to conduct pre-complaint bona fide negotiations with the record owner of the property to be taken, and that therefore the municipality did not have to conduct negotiations with the assignee of a mortgagee which had obtained a final judgment of foreclosure.

In this case, the municipality had commenced a condemnation action to acquire a deteriorated 54 unit residential apartment complex for redevelopment purposes. Pursuant to *N.J.S.A. 20:3-6* of the Eminent Domain Act of 1971, the municipality made an offer in writing on November 11, 2011, and at that time provided the record owner with a copy of the appraisal report upon which the municipality had based its offer of \$270,000, along with an engineering facility assessment. In a letter dated November 23, 2011, the record owner rejected the offer, stating that it would be "in a position to discuss more reasonable compensation in an amount which would satisfy all liens and encumbrances on the property." The record owner did not provide any specific information about the liens or encumbrances or their amounts, or information about any higher prior offer to purchase the property (including one from the designated redeveloper), and made no monetary counter-offer.

On the same day as the record owner had rejected the offer, the lienor advised the municipality that it was the real party in interest, having obtained an order of foreclosure on the property and with the expectation that the sheriff's sale would be held shortly. The lienor further advised that the municipality's offer was inconsistent with a prior offer made by the designated redeveloper. The lienor also pointed out that the court in the foreclosure action had noted that the owner would not be able to sell the property without the lienor's approval. The municipality did not respond to the lienor and filed its complaint on December 5, 2011.

The lienor moved to dismiss the condemnation action. The trial court denied the motion, concluding that the municipality was only obligated to conduct pre-complaint bona fide negotiations with the record owner, which the municipality had done. The trial court determined that the record owner's November 23, 2011 response was inadequate to warrant further negotiations or indicate that the property was worth more than the municipality's offer, entered final judgment of proper exercise of eminent domain, and appointed commissioners to determine the value of the property.

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On appeal by the lienor, the Appellate Division affirmed. Under *N.J.S.A. 20:3-6*, a condemnor is obligated to conduct pre-complaint bona fide negotiations with the record owner. The Appellate Division relied on *City of Atlantic City v. Cynwyd Investments*, 148 N.J. 55 (1997) that the holder of a 99 year lease was not entitled to negotiations with the condemnor, and distinguished *Town of Kearny v. Disc. City of Old Bridge, Inc.*, 205 N.J. 386 (2011) that had determined that a condemnor did have to negotiate with the tenant, in the limited circumstance where only the tenancy was being acquired by condemnation. The Court acknowledged that the lienor would have the opportunity to participate in the valuation proceedings.

Simply put, the Appellate Division applied the plain language of the statute. The condemnor was obligated to negotiate with the record owner, and the lienor was not the record owner.