

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mohamad Elbari, :
Appellant :
v. :
Redevelopment Authority : No. 1924 C.D. 2012
of The City of Philadelphia : Submitted: June 17, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 16, 2013

Mohamad Elbari (Elbari), owner of a tract of land located at 1619 N. Sydenham Street, Philadelphia, (Property) appeals from the order of the Court of Common Pleas of Philadelphia County (Common Pleas Court) that denied his motion for attorney fees incurred from a previous condemnation proceeding that involved the Redevelopment Authority of The City of Philadelphia (RDA).¹

¹ Elbari does not consistently state whether he is requesting attorney fees from the underlying eminent domain proceeding or only the attorney fees incurred in defense of RDA's post-trial motions and appeals to this Court (*see*: Brief for Appellant Elbari at 11; Reproduced Record (R.R.) at 24; Supplemental Reproduced Record (S.R.R.) at 5b, 10b, 14b, 44b). At trial, Elbari's attorney stated that the attorney fees were the result of defending RDA's appeal from the original jury decision (S.R.R. at 44b), **however the amount requested in Appellant Elbari's Brief (\$28,320) is consistent with fees for the original trial and the appeals process**: "Appellant's [Elbari's] counsel incurred approximately \$28,000.00 in this matter during the jury trial as well as researching and drafting responses and brief's [sic] to the Redevelopment Authorities' [sic] post-trial motions and appeals." Brief of Appellant at 11; see also Brief of Appellee at 10, S.R.R. at 9b-10b.

I. Previous History

Elbari owned property in the Temple University neighborhood of Philadelphia which he converted into two subdivided apartment units. On March 10, 2005, RDA condemned Elbari's Property and on December 18, 2007, the Board of View awarded Elbari \$206,000.00 in compensation plus \$500.00 for reasonable attorney fees. Elbari appealed the Board of View's decision to the Court of Common Pleas of Philadelphia County (Trial Court) and on March 25, 2010, a jury trial was conducted and at its conclusion Elbari was awarded \$305,000.00 for the fair market value of the Property. Following the jury trial, RDA filed a motion for post-trial relief and requested a new trial, which was denied by the Trial Court. RDA appealed to this Court and alleged in its statement of errors complained of on appeal (Pa. R.A.P. 1925(b)) that the Trial Court erred and abused its discretion when it:

1. ...[Allowed Elbari's] real estate appraiser to testify regarding the valuation of Plaintiff's property when the... appraiser did not value the property as of the Date of Taking.
2. ...[Failed] to charge the jury on adverse inference regarding a videotape... showing the condition of the property.
3. ...[Refused] to allow the defense counsel to introduce two (2) court orders... into evidence which ordered [Elbari] to produce the videotape.
4. ...[Allowed] [Elbari's] real estate expert... to testify at length regarding the report of [RDA's] expert in [Elbari's] case...
5. ...[Failed] to order a Remittitur.

RDA's Statement of Errors Complained of on Appeal at 1-2, July 14, 2010.

On November 29, 2010, the Trial Court filed an opinion and concluded that no error was committed:

I. The trial court properly admitted the testimony of [Elbari's] real estate appraiser because an appraisal done three months after the taking is within the statutory time frame of "immediately after" the taking.

....

II. The trial court did not err or abuse its discretion in denying the request to introduce two discovery court orders into evidence or denying [RDA's] request for an adverse inference charge regarding a videotape.

....

III. The trial court properly allowed the testimony of appellee's expert.

....

IV. The trial court properly denied [RDA's] request for remittitur as the jury award was not excessive and was not against the weight of the evidence.

Mohamad Elbari v. Redevelopment Authority of the City of Philadelphia, (Philadelphia County, March Term, 2008, No. 03719) at 7, 10, 16, 18.

On appeal, this Court affirmed the order of the Trial Court dated November 29, 2010, adopted its opinion, and stated that the Trial Court "thoroughly discuss[ed] and properly dispose[d] of the arguments raised on appeal to this Court..." *Elbari v. Redevelopment Authority of the City of Philadelphia* (Pa. Cmwlth., No. 1464 C.D. 2010, filed November 17, 2011), slip op. at 2.

II. Present Matter

On April 16, 2012, Elbari filed a motion for attorney fees in excess of \$500.00 pursuant to Section 709 of the *current* Eminent Domain Code, 26 Pa.C.S. §709,² in support of his position that he was entitled to reasonable attorney fees because he was victorious on every level of appeal initiated by RDA.³ RDA

² In September 2006, the Eminent Domain Code was amended to increase the maximum attorney fees to \$4,000.00 where a declaration of taking is filed. Act of June 22 1964, Special Sess., P.L. 84, *as amended*, formerly 26 P.S. §§1-101 to 1-903, repealed by the Act of May 4, 2006, P.L. 112 (Act 34) (Former Code). Act 34 enacted the consolidated Eminent Domain Code at 26 Pa. C.S. §§101-1106. Although repealed and replaced by Act 34, the Former Code governed this case because, with certain inapplicable exceptions, Act 34 only applies to condemnations effected on or after September 1, 2006. See Section 6(1) of Act 34.

³ Elbari specifically claimed:

....

2. On or about March 11, 2011 the matter [condemnation proceeding] was tried before a Jury and a verdict was entered in the sum of Three Hundred and Five Thousand Dollars (\$305,000.00).

3. Plaintiff [Elbari] prevailed in the underlying suit

4. Thereafter, Defendant filed a Motion for Post Trial Relief before this Honorable Court on or about March 17, 2010.

5. After oral argument, this Honorable Court denied Defendant's Motion for Post Trial Relief on June 16, 2010.

6. Plaintiff once again prevailed against Defendant.

7. A Notice of Appeal to the Commonwealth Court was filed on July 2, 2010.

8. On October 13, 2011 the Commonwealth Court determined that oral arguments were not necessary in this matter and thereafter affirmed the order of the Court of Common Pleas of Philadelphia County on November 17, 2011.

9. Plaintiff has prevailed not only at trial, but also at each level of appeal in this matter.

10. Plaintiff has incurred substantial attorney's fees and costs in defending this matter....

....

12. Therefore Plaintiff is entitled to reasonable expense [sic] incurred in this matter.

(Footnote continued on next page...)

responded and stated that Section 610 of the Eminent Domain Code (Former Code), 26 P.S. §1-610 limited Elbari's attorney fee recovery to \$500:

10. ... It is admitted that the Plaintiff [Elbari] incurred attorney's fees. The Redevelopment Authority is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations, therefore, same are denied and specific proof is demanded. By further answer, it is averred that the Plaintiff [Elbari] is limited by statute to \$500.00 in counsel fees. [Section 610 of the Eminent Domain Code] 26 P.S. §1-610.

....

12. ... It is denied that the Plaintiff [Elbari] is entitled to reasonable expenses incurred in this matter. By further answer it is averred that the Eminent Domain Code controls in this matter and the Condemnee [Elbari] Is limited to \$500.00 in attorney's fees under the Eminent Domain Code[,] 26 P.S. §1-610.

RDA's Answer to Plaintiff's Motion for Attorney Fees.

On September 4, 2012, the Common Pleas Court denied Elbari's motion for attorney fees. Elbari appealed to this Court and was directed by the Common Pleas Court to file a statement of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b). On December 6, 2012, the Common Pleas Court filed an opinion regarding the appeal taken to Commonwealth Court, stating:

Per [Section 610 of] the Eminent Domain Code, a limit of \$500 is placed on the attorney's fees recoverable in a condemnation proceeding. 26 P.S. §1-610 provides: "the owner of any right, title or interest in real property

(continued...)

Elbari's Motion for Attorney Fees, April 16, 2012 at 1-2.

acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees under sections 406(e), 408 or 609 of this act *shall be reimbursed in an amount not to exceed five hundred (\$500) as a payment towards reasonable expenses actually incurred for appraisal, attorney and engineering fees.*” [Footnote omitted.] In Com., Dept. of Transp. v. Dixon Ticonderoga Co., 93 Pa. Commw. 523, 500 A. 2d. 938 (1985)...[t]he court opined that when a declaration of taking is filed, the maximum award of attorney’s fees is \$500. *Id.* at 62 [sic], 943.... Plaintiff Elbari shines a light on 26 Pa. C.S. §709 to buttress his argument that he is entitled to reasonable attorneys fees. There are two fatal flaws with proffering this argument. First the statute is entitled *Condemnee’s costs where no declaration of taking filed.* The underlying condemnation proceeding was commenced by filing a declaration of taking (See Memo of Law in support of RDA’s Answer to Plaintiff’s Motion of Counsel Fees at pg. 2). Therefore citation to this section is misplaced. Furthermore, 26 Pa. C.S. §709 was approved May 4, 2006 and made effective 120 days thereafter. (2006 Pa. ALS 34; 2006 Pa. Laws 34; 2005 Pa. HB 2054). It is settled law that statutes do not operate retroactively and 1 Pa. C.S.A. [sic] §1926 states: “No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.” The underlying condemnation proceeding commenced on March 10, 2005, nearly eighteen months prior to the implementation of 26 Pa.C.S.§709, and there is no indication that the General Assembly intended that the statute operate retroactively.

Based on statutory and case law it is clear that Plaintiff Elbari is entitled to receive a maximum of \$500 in attorney’s fees as a result of the underlying condemnation proceeding.

Common Pleas Court Opinion, December 6, 2012 at 3-5, R.R. at 25-27.

(Emphasis in Original).

III. Issues on Appeal

Elbari contends⁴ that the Common Pleas Court abused its discretion as a matter of law when it denied Elbari's motion for attorney fees in excess of \$500.00, and when it held that Elbari's claims were preempted by the Former Code.⁵

Section 610 of the Former Code, 26 P.S. §1-610,⁶ states that the owner of property acquired by a state agency shall be reimbursed no more than \$500.00

⁴ In considering the propriety of an award of counsel fees, appellate review is limited to determining whether the award constituted an abuse of discretion. *Solebury Township v. Department of Environmental Protection*, 593 Pa. 146, 983 A.2d 990 (2007).

⁵ Elbari specifically alleges the Common Pleas Court abused its discretion and erred as a matter of law when it:

1. ... [D]enied Plaintiff's [Elbari's] motion for Attorney Fees.
2. ... [E]rroreously held that Plaintiff's claims were preempted by the Eminent Domain Code.
3. ... [D]enied Plaintiff's Motion for Attorney's fees outside of the scope of [Section 610 of the Eminent Domain Code] 26 P.S. §[1-]610.
4. ... [F]ound that Plaintiff was not entitled to reasonable attorney's fees in this matter.

Elbari's Statement of Matters to be Raised on Appeal, October 15, 2012, at 1-2.

⁶ Section 610 of the Former Code provides:

The owner of any right, title or interest in real property acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees under section 406(e), 408 or 609 of this act, shall be reimbursed in an amount not to exceed five hundred (\$500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees.

(Footnote continued on next page...)

toward reasonable attorney and engineering fees. Elbari claims that he has successfully defended all subsequent appeals made by the RDA against his initial jury recovery, and therefore the payment of attorney fees should be governed by the general rule that the losing party should bear the costs of appeal.

The unequivocal language of Section 610 of the Former Code provides that \$500.00 shall be paid *toward* reasonable expenses “actually incurred for appraisal, attorney and engineering fees”, not all costs and fees that were incurred. Section 610 of the Former Code, 26 P.S. §1-610. In *Department of Transportation v. Dixon Ticonderoga*, 500 A.2d 938 (Pa. Cmwlth. 1985), this Court in an eminent domain proceeding was presented (among other things) with the question of whether an order of the Delaware County Court of Common Pleas which awarded \$1,000 in attorney fees with an additional \$1,000 per day penalty for late payment to condemnee Dixon, violated Section 610 of the Former Code, 26 P.S. §1-610. In reversing, this Court held that where a declaration of taking was filed, the maximum attorney fees are \$500.00, and the awarding of fees in excess was in error. *Id.* at 943.

As the Common Pleas Court properly noted, the analysis from *Dixon Ticonderoga* applies in the present case. Section 610 of the Former Code, 26 P.S. §1-610, places a limit on the attorney fees at \$500.00. Elbari’s claim that RDA,

(continued...)

Section 406(e) relates to Preliminary Objections, Section 408 relates to Revocation of Condemnation Proceedings, and Section 609 relates to Condemnee’s costs when no declaration of taking is filed. These subsections are not applicable in the present case.

which initiated and lost the subsequent appeals should be responsible for attorney fees, and Elbari's claim that the losing party is typically responsible for costs on appeal, are both made without citation to proper authority. Even if this Court took Elbari's contention as true, he admitted in his brief that "Typically, costs on appeal are to be paid by the party finally losing the cause, *except otherwise provided by statute*," (Brief for Appellant Elbari at 13). (Emphasis Added). Here, Section 610 has provided a clear direction regarding which party shall bear the costs of attorney fees. In addition, Elbari admits that the applicable portion of the Former Code only entitles him to \$500.00 in attorney fees. Brief for Appellant Elbari at 12.

Elbari next contends that the present matter falls outside the intention of the legislature, and therefore outside the statute, because Section 610 of the Former Code, 26 P.S. §1-610, was enacted to allow condemnees to receive just compensation for their property, not to hinder recovery in subsequent proceedings initiated by the condemning agency. Therefore, the cap on Elbari's attorney fees should not apply.

This Court has held that the Former Code is the exclusive procedure to govern condemnations where the additional statutory criteria are met. Section 303 of the Former Code, 26 P.S. §1-303⁷; *See also Fulmer v. White Oak Borough*, 606 A.2d 589 (Pa. Cmwlth. 1992). In addition, as Elbari states in his brief, if the plain and ordinary meaning of a statute is clear, judicial construction is neither

⁷ Section 303 of the Former Code provides: "It is intended by this act to provide a complete and exclusive procedure and law to govern all condemnation of property for public purposes and the assessment of damages therefor."

necessary nor permitted (*see Price v. Pennsylvania Property & Casualty Insurance Guarantee Association*, 795 A.2d 407 (Pa. Super. 2002)) and the Supreme Court has previously held that Section 610 of the Former Code, 26 P.S. §1-610 is unambiguous. *In re: Condemnation by the Pennsylvania State Turnpike Commission of 14.38 Acres in Fee Simple in North Beaver Township*, 548 Pa. 433, 698 A.2d 39 (1997). Furthermore, despite Elbari's contention, Section 610 is not silent as to which party shall bear the costs of appeal, but explicitly states that the condemnee shall be compensated \$500 for costs and attorney fees.

Elbari argues that Section 610 of the Former Code, 26 P.S. §1-610, would apply if the proceedings had ceased with the Trial Court, but because RDA filed subsequent post-trial motion and appeals, Elbari should qualify for compensation outside the statute. This argument is substantially weakened by the fact that Elbari's calculation for attorney fees included the full cost of the initial condemnation proceeding and the subsequent appeals (S.R.R. 10b). Furthermore, there is no evidence that the language of Section 610 indicates a distinction between attorney fees at trial and attorney fees in the appeals process.

Accordingly, this Court affirms the denial of Elbari's motion for attorney's fees in excess of \$500.00.

BERNARD L. MCGINLEY, Judge

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Appellant	:	
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v.	:	
	:	
Redevelopment Authority	:	No. 1924 C.D. 2012
of The City of Philadelphia	:	
	:	

ORDER

AND NOW, this 16th day of August, 2013, the order of the Court of Common Pleas of Philadelphia County dated September 4th, 2012, in the above-captioned matter is hereby AFFIRMED.

BERNARD L. MCGINLEY, Judge