SUPERIOR COURT OF NEW JERSEY
CAPE MAY COUNTY-LAW DIVISION

Edward W. Klumpp et al,	:	**Civil Action**
Plaintiff,	:	**DOCKET NO.: CPM L 651-04**
v.	:	**JUDGMENT**
Borough of Avalon,	:	
Defendant.	:	

This matter coming on before the Court on remand from the Supreme Court with Richard M. Hluchan, Esquire appearing for Plaintiffs Edward W. Klumpp and Nancy M. Klumpp, and Michael J. Donohue, Esquire appearing for the Defendant Borough of Avalon, and the Court having taken testimony, having reviewed documents and having heard argument, and for good cause shown,

IT IS ON this 29th day of March, 2012, ORDERED that the following award is made in favor of Plaintiff Edward W. Klumpp and Nancy M. Klumpp and against the Borough of Avalon:

1. Interest - $ 284,802.00;
2. Attorneys fees - $337,706;
3. Costs - $28,783.90.

Daryl F. Todd, J.S.C.

Daryl F. Todd, Sr., J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

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CASE: **Edward W. Klumpp et al v Borough of Avalon**
DOCKET NO. **CPM L 651-04**

MEMORANDUM OF DECISION

This matter comes before this Court on remand from the Supreme Court of New Jersey to permit the Plaintiffs to file a further amendment to the Complaint to set forth a claim for inverse condemnation to determine the amount of just compensation to be paid by the Borough of Avalon to Edward W. Klumpp and Nancy M. Klumpp. Part of the process is to have the property valued as of the date of taking and then add interest and appropriate fees and costs.

The opinion above resulting in remand was by Justice LaVecchia

for a unanimous court. Klumpp v Borough of Avalon, 202 N.J. 390 (2010).

The Court need not and will not repeat the long and detailed procedural history in this case or all of the underlying facts covered extensively above. However, some summary is in order.

Mr. and Mrs. Klumpp purchased three (3) oceanfront lots in Avalon in 1960 and constructed a single family home on them which their family used during the summers of 1960 and 1961. However, the March storm of 1962, "a legendary nor'easter", called by Jersey locals "the March Storm of '62" and by the U.S. Weather Bureau "The Great Atlantic Storm", destroyed their summer home.

Avalon took emergency action to create sand dunes along a large swath of its oceanfront which included the Klumpp's property. In taking the emergency action, Avalon acknowledged its obligation to pay just compensation for property it was seizing to construct the dunes. It set up a land swap system but never notified the Klumpp's who did not return to Avalon for many years following their first visit immediately after the storm.

It appears the Klumpps had no further involvement with Avalon

for many years except for a brief post storm visit. The Klumpps have not been specific as to just what year it was before they returned to Avalon to again see their land; but it clearly was many years and they had no contact with Avalon officials with regard to the storm and their property before 1970.

The Klumpps continued to own the property. They received tax bills of $3.00 per year which they paid. The taxes were based upon an assessment of approximately $100. No condemnation action was ever instituted by Avalon. In fact, Avalon for decades took a position that its actions had not constituted a taking. However, when this litigation ensued, Avalon changed its legal position to contend a taking had occurred decades before but the statute of limitations had expired for any cause of action that the Klumpps might have had.

After this matter worked its way through our Court system over a period of years, Justice LaVecchia concluded her opinion as follows:

> Indeed, it bears noting that in the very resolution passed by the Borough in 1962, pursuant to the emergency authorization to shore communities contained in *N.J.S.A.* App. A:9-51.5, the Borough acknowledged its obligation to pay just compensation for the property it was about to seize in order to construct its shore-protecting dune. That promise was not kept in respect of the Klumpps. The Borough cannot now, in equity, stand behind the six-year statute of limitations period for an inverse

> condemnation action. *See W.V. Pangborne & Co., supra,* 116 *N.J.* at 553-57, 562 A.2d 222 (1989). To the extent that the judgment cut off the Klumpps from access to such an action, we reverse and remand. Equity demands that the Klumpps be allowed the opportunity to amend their complaint to include a claim for inverse condemnation. *See Schiavone Constr. Co. v. Hackensack Meadowlands Dev. Comm'n,*98 N.J. 258, 265-66, 486 A.2d 330 (1985). We therefore remand to the trial court for further proceedings to determine the amount of just compensation the Borough must pay to plaintiffs. *See Clarke, supra,* 445 *U.S.* at 258, 100 *S.Ct.* at 1130, 63 *L.Ed.*2d at 378 (setting property value at time of taking); *Washington Mkt. Enters, supra,* 68 *N.J.* at 123-24, 343 A.2d 408 (entitling plaintiffs to value of property as of date of taking, plus interest).
>
> **V.**
>
> The judgment of the Appellate Division is affirmed in part and reversed in part, and the matter is remanded for further proceedings consistent with this opinion.

Following the remand, inverse condemnation was claimed in an Amended Complaint filed on June 30, 2010 and condemnation commissioners were appointed and indicated fair market value as of the time of taking in 1965 at $5400. The parties have agreed with that fair market value determination. The matter is now before this Court for the assessment of interest, attorney fees and costs.

The parties have presented to this Court a stark contrast with respect to their positions with respect to how interest should be

calculated.

Plaintiff's Position

The Klumpps have presented the appraisal of J. P. Bainbridge, N.A.I., dated November 15, 2011 stating that he formed an opinion that the estimated fair market value of the real estate was $5,500,000 as of the effective date of November 10, 2011. The three (3) lots that have been owned by the Klumpps since 1960 contain 9000 square feet of oceanfront land. Bainbridge conducted a standard appraisal using comparables in which other oceanfront properties were sold between 2008 and 2012 and making some adjustments as compared to the subject property. The Court need not discuss the six (6) comparables in detail. Bainbridge said that he was requested to "determine a reasonable amount of interest payable on $5400 from approximately 1965 through 2011..." The methodology he chose to determine the amount of interest payable was to do a full blown appraisal of what the value of the lots would be today. That appraisal report was submitted November 15, 2011. Thereafter, Plaintiff's expert, Kristin M. Kucsma, M.A. in her report of December 22, 2011 stated that "the appropriate measure of damages and

interest would be based on the appreciation in real estate prices in the Borough of Avalon the (sic) occurred between 1965 and the present time" and relied upon the appraisal report of J. P. Bainbridge indicating a value of $5,500,000. Kucsma then gave credit for the $5400 fair market value finding of the condemnation commissioners and arrived at her interest due as $5,494,600. Her reasoning essentially parrots the reasoning of Mr. Bainbridge. However, she then reduces it to a compounded interest rate of 16.25% in order to translate that current fair market value into an interest rate. The position of the Plaintiff is that an appropriate reasonable rate of interest from 1965 to the present is 16.25%.

Defendant's Position

Avalon takes a more traditional approach and presents the Court with three (3) options for the calculation of interest.

The first it presents what it calls its "prudent investor calculation" as prepared by Douglas J. Heun, C.P.A. Mr. Heun's prudent investor calculation is based upon a six (6) month certificate of deposit being renewed continuously from 1965 to the present and deducting taxes that would have been paid on the interest, and

arriving at an after taxes total of $45, 204.

The second, Avalon calculated the pre-judgment R.4:42-11(b) interest from January 1, 1965 to the present and compounded it resulting in an interest calculation of $217,634. The Plaintiffs and Defendant differed on their calculation of this amount but have now resolved it to indicate to the Court the agreed calculation is $284,802.

Third, Avalon calculated the post-judgment rate under R. 4:42-11 from January 1, 1965 to the present and compounded it resulting in an interest calculation of $91,780. R. 4:42-11 provides for interest to be calculated as simple interest.

However, Avalon has conceded for purposes of this action that the interest should be compounded based on the payment due as of January 1, 1965. In calculations of both the pre-judgment and post judgment rates, the methodology employed was that "the cumulative balances is calculated by adding the interest for the year to the prior year balance. The interest is calculated by multiplying the prior years cumulative balance by the annual interest rate." The pre-judgment and the post judgment interest rates were the same from September 14, 1981 to the present date. However, prior to that date the pre-judgment rate was 12% and the post judgment rate varied between

6% and 8% depending upon the year. That accounts for the difference in the calculations since the pre-judgment rate for the first sixteen (16) years and nine (9) months from 1965 until September 14, 1981 was at the higher 12% interest and based upon compounding resulted in a much higher amount.

Discussion

We know that in New Jersey, "interest on a condemnation award runs from either the date of commencement of the action or the date of actual taking, whichever is earlier." Casino Reinvestment Development Authority v. Hauck, 317 N. J. Super. 584 (App. Div. 1999), aff'd 162 N.J. 576. Here the taking has been determined to be 1965 and the Complaint was not filed until 2004. The 1965 date controls. The parties have agreed to calculate interest from January 1, 2005 forward.

The trial court is to identify and select an interest rate "which would best indemnify the condemnee for the loss of use of the compensation to which he has been entitled..." Township of Wayne v. Cassalty, 137 N.J. Super. 464, 474 (App. Div. 1975).

The amount of the interest rate is left to the sound discretion of the Court based upon the above guidelines; but no particular

methodology is provided by our Appellate Courts as a guide post. We know that the "award of interest does not lend itself to rigid guidelines, but rather is best considered on a case by case basis in order to determine compensation which is just." State v Nordstrom, 54 N.J. 50, 54 (1969).

This case is unusual because of the almost fifty (50) years since the Klumpps summer home was destroyed in 1962. The fiftieth (50th) anniversary was March 5, 6, and 7 of this year. The Court is working from a date of taking of 1965.

Should we assume that the Plaintiffs would have held that oceanfront as a second home property for the past forty-seven (47) years? Should we assume that the Plaintiffs would have held the property for the period of their children's childhood and then perhaps cashed it in to help pay for college, if necessary? Should we assume that the real estate market for a replacement property not on the oceanfront (some were not on the oceanfront) would have appreciated at the 16.25% annual rate on a compounded basis? Should we discount for periods of hyper inflation? Should we account for recessions that appeared periodically during these forty-seven (47) years from 1965, including the traumatic downturn in value

generally of real estate from 2006 through today? Is it possible or likely that the Plaintiffs would have sold the real estate somewhere during these forty-seven (47) years and perhaps purchased other real estate? Or should we assume that they would have sold the real estate and not reinvested in real estate, but perhaps in the stock market? If investment was made in the stock market, would it have been in speculative stocks, mutual funds or more conservative bonds? The record throughout this case gives this Court no clue with respect to what the Klumpps would have done with the property or with any proceeds from the sale of the property.

This Court's role is not to determine the fair market value of the real estate as of now and turn that into an interest rate. The fair Markey value determination has been done as of the date of taking as it should have been. We know that the property was purchased in 1960 for $4000 and a condemnation award based upon a 1965 date of taking was $5400. The Klumpps were not required to accept a swap property in 1965 when the taking is deemed to have occurred. They could easily and rightly have required payment in cash and moved on. They did move on, but they failed to ask for the cash; and the Borough of Avalon didn't pony up with an offer of cash as they should have

done. We now know that that cash would have been $5400.

This Court's job is simply, or not so simply, to calculate an appropriate rate of interest to be applied over a wide-ranging economic history of some forty-seven (47) years. The Court is left with the concept of averages. When the economic facts over a period of forty-seven (47) years don't allow for specificity and certainty, one must fall back on averages. So what is an appropriate average interest rate for such an extended period of time?

During the early years of the Klumpps investment lives, they obviously were willing to take a risk – they invested in oceanfront property, built a home and it washed away. Perhaps as their children grew they may have been more likely to want to grow their assets in a diversified portfolio in the stock market, concentrating on perhaps capital appreciation and later turning to substantial income investments before concentrating on preservation of capital. However, perhaps they would have gotten caught in the "dot com" boom and bust and depleted their assets. Perhaps they would have been among those who saw their capital substantially reduced because of the financial collapse in 2008.

The Court raises all these possible scenarios to indicate the lack

of knowledge of such factors upon which to base a decision. The Plaintiffs have not sought to develop a record to attempt to establish that they would have accepted a land swap of unspecified property and kept it for all these years. Their attachment to Avalon seemed tenuous at best as they did not again return to Avalon after the post storm immediate visit until many years later – perhaps decades. In any event, it was a great many years. So we fall back on the requirement that we select a rate or rates of interest that would best indemnify the condemnee for the loss of use of the compensation if paid in 1965.

All professions are the subject of humor at times. Certainly lawyers know that. However, this case deals with economics.

> A mathematician, an accountant and an economist apply for the same job.
>
> The interviewer calls in the mathematician and asks "What do two plus two equal?" The mathematician replies "Four." The interviewer asks "Four, exactly?" The mathematician looks at the interviewer incredulously and says "Yes, four, exactly."
>
> Then the interviewer calls in the accountant and asks the same question "What do two plus two equal?" The accountant says "On average, four - give or take ten percent, but on average, four."
>
> Then the interviewer calls in the economist and poses the same question "What do two plus two equal?" The economist gets up, locks the door, closes the shade, sits down next to the interviewer and says, "What do you want it to equal"?

Here the economist used current real estate value to arrive at an interest rate rather than providing the Court with a traditional interest rate analysis. The Court rejects that analysis by the economist.

The Court also rejects the most conservative or those who would take flights of fancy in their investments. Don't rock the boat investing – steady as she goes – allows the Court to arrive at a rate of interest that meets the test of the controlling authorities.

Reliance on a tort concept can be helpful. We know we want to avoid negligence in all things, including investing, because that would not be prudent. Negligence is defined as the failure to exercise that degree of care which a person of ordinary prudence would exercise. Prudence is defined in common usage as follows: (1) the quality or fact of being prudent (2) caution with regard to practical matters (3) regard for one's own interest (4) provident care in the management of resources. Synonyms for prudence include foresight and forethought. One who is prudent is defined as follows (1) Judicious or wisely cautious in practical affairs (2) careful in providing for the future. Synonyms for prudent include sensible, economical, thrifty and saving.

The parties have provided the Court, some at the Court's request and some not, a wide-range of methodologies to arrive at an appropriate rate of interest. For example, the ten (10) year Treasuries average of 7% compounded results in interest of $129,847. Triple A rated corporate bonds average 8% resulting in interest of $201,053. A lesser grade of corporate bonds, BAA, averages 9% resulting in interest of $310,055. The Court compared these with the pre-judgment interest rate of our court system over the period 1965 to date and finds it very appropriate. It has stood the test of time on average. The accumulated pre-judgment interest compounded totals $284,802 and that is the appropriate amount based on the length of time and fluctuating interest rates reflected in N.J.S.A. 4:42-11. This results in an interest rate of more than 8% and closer to 9% with which the Court finds appropriately indemnifies for the loss of use of the $5400.

Counsel Fees

The issue of the award of attorneys fees is also not simple.

The Complaint in this matter filed November 18, 2004 sought a judgment or order declaring the Plaintiff to have the necessary pedestrian and vehicular access to the property. It did not seek damages for a taking under eminent domain. However, Plaintiffs

advised Avalon on November 13, 2003 as follows through their attorney at that time:

> "I suggest to you that it is illegal for the Borough to deprive the Klumpps of access to their property, and that such action by the Borough may constitute a taking land for which just compensation must be paid."

In spite of reminder letter of January 9, 2004 and April 13, 2004, there was no response by the Borough. The Complaint followed.

A First Amended Complaint was filed April 13, 2007 adding a Second Count alleging trespass and continuing trespass and a Third Count demanding possession. It also did not seek damages for a taking under eminent domain.

It was not until the New Jersey Supreme Court rescued this case from the statute of limitations issues based upon equity that Plaintiffs finally, following the instruction of the Supreme Court, filed a Second Amended Complaint now finally claiming inverse condemnation and seeking damages.

The condemnation process proceeded in due course with the appointment of commissioners and the agreed upon fair market value award of $5400.

The Borough of Avalon makes limited comment on the application for counsel fees and costs. It first notes that the remand did not discuss attorneys fees. Klumpp, supra. Avalon argues this precludes an award of counsel fees. There was no limitation in the remand to this Court. It permitted Plaintiffs to file to seek Inverse Condemnation consistent with the Court's direction and they did so. Finally, Avalon states that the hourly rate of the Plaintiff's attorneys should be adjusted downward to the rate approved by Avalon for its attorney. Avalon makes no criticism of the hours spent by Plaintiff's attorney. Avalon also makes no criticism or comment upon the costs requested by the Plaintiffs.

Plaintiff's supplemental submission to the Court indicates total legal fees as of February 10, 2012 (which includes the trial) amounts to $297,706 with $140,235 being from Ballard Spahr LLP and $157,470.50 from Hyland Levin LLP. The total amount of costs and expenses are $28,783.90 of which $5,502.04 are from Ballard Spahr LLP and $23,281.86 from Hyland Levin LLP.

Plaintiffs move for attorneys' fees and costs pursuant to R. 4:42-9(a)(8) and N.J.S.A. 20:3-26(c).

N.J.S.A. 20:3-26(c) provides that when the "Plaintiff shall have brought an action to compel condemnation against a defendant

having the power to condemn, the court shall . . . in its discretion award such Plaintiff his reasonable costs, disbursements, and expenses, including reasonable appraisal, attorney, and engineering fees actually incurred . . ." (emphasis added).

It is clear the Klumpps are entitled to the reasonable fees incurred in pursuing their inverse condemnation. The question presently before the Court is whether the expenses incurred before the Klumpps filed their Second Amended Complaint on June 30, 2010 to include the inverse condemnation claim may be awarded under N.J.S.A. 20:3-26(c).

First, N.J.S.A. 20:3-2(g) defines an "action" as a "legal proceeding" in which the:

> (1) property is being condemned or required to be condemned;
> (2) the amount of compensation to be paid for such condemnation is being fixed;
> (3) the persons entitled to such compensation and their interests therein are being determined; and
> (4) all other matters incidental to or arising therefrom are being adjudicated.

Second, a condemnation "action" begins when "a verified complaint in form and content specified by the rules [is filed and demands] judgment that condemnor is duly vested with and has duly exercised its authority to acquire the property being condemned, and

for an order appointing commissioners to fix the compensation required to be paid." N.J.S.A. 20:3-8.

The statutory provision, however, does not limit the recovery of fees to those expended in the action, but allows an award of fees that are "actually incurred" and "reasonable." N.J.S.A. 20:3-26(c); see Township of West Orange v. 769 Associates, LLC, 198 N.J. 529, 541 (2008) (allowing recovery on precomplaint expenses incurred by defendants in a matter where the township ultimately abandoned its condemnation complaint). Of great importance is the fact that "as a general rule, when 'the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." 198 N.J. at 541 (citations omitted). Thus, because the legislature chose to forego specific language limiting recoverable expenses to the "action," the statute should be read more broadly. Given this language and the language contained in N.J.S.A. 20:3-2(g)(4) which includes in a condemnation action "all other matters incidental or arising therefrom [that] are being adjudicated," it is appropriate for the Court to award costs and fees expended if they are reasonably related to the underlying facts and circumstances of the condemnation matter.

The Court considers the Township of West Orange, supra. instructive. That case involved a condemnation action which was abandoned. The analogy to this case is that the Borough of Avalon abandoned its efforts to pay just compensation by not contacting the Klumpps in 1962 through 1965 when the dune system was completed. The Borough had an obligation to negotiate and did not. It had an affirmative obligation to follow the procedures of the Eminent Domain Act, N.J.S.A. 20:3-5 to 26 and it did not do so.

This matter has been pending before the Court since Plaintiffs initially filed their Complaint on November 18, 2004. The eventual outcome of the matter, which ultimately resulted in a successful inverse condemnation claim made by the Plaintiffs, proceeded from one, uninterrupted series of proceedings. The New Jersey Supreme Court determined the taking occurred in 1965 when the Borough constructed the emergency sand dune on the Klumpps property. Because the New Jersey legislature specifically chose not to limit the recovery of costs and fees for expenses occurred "in the action" but rather allowed recovery for "reasonable" costs and fees "actually incurred" and expressly included "all other matters incidental to or arising therefrom" the condemnation action, the Klumpps are entitled

to recover all costs and attorney's fees reasonably incurred in pursuing this matter.

The Court also finds a basis sufficient for fee enhancement. Current counsel took on this matter on July 28, 2009 on a contingency basis and petitioned for certification successfully ultimately leading to success in this matter. Walker v. Power Mall Shopping Plaza, 209 N.J. 124 (2012); Rendine v. Pantzer, 141 N.J. 292 (1995). The suggested enhancement midway between 20% and 35% is appropriate. The lodestar was previously determined as $157,470.50 for Hyland Levin LLP. The enhancement shall be $40,000. Hyland Levin LLP total fees are $197,470.50. Ballard Spahr fees are $140, 235.50.

Conclusion

Interest is awarded in the amount of $284,802.

Attorney fees are awarded in the amount of $337,706.

Costs are awarded in the amount of $28,783.90.

An appropriate form of Judgment has been executed.

Conformed copies of that Judgment will accompany this Memorandum of Decision.

March 29, 2012

Daryl E. Todd, Sr., J.S.C.