

## CONDEMNATION AND TAX CERTIORARI

# How Much Time Do I Have To File My Condemnation Claim?

**T**he question as to how much time a condemnee has to file a condemnation claim actually is a trick question. It depends on so many variables. Who was the condemnor? How did the condemnee learn of the taking? Was the taking de jure or de facto?

## The De Jure Taking

New York has two separate ways to acquire title by the exercise of eminent domain. The Eminent Domain Procedure Law sets forth those two procedures depending on who is the condemnor. EDPL Sec. 501. A condemnor can file an appropriation map in the County Clerk's Office, or it can file a petition to condemn in the Supreme Court. The petition will request an order to file an acquisition map in the County Clerk's Office.

If the State of New York or certain other state entities appropriate property, and that is the term, appropriate, one has three years from the accrual of the claim to file a claim against the state in the Court of Claims. Court of Claims Act Section 10, Subd. 1.

In both types of eminent domain, the condemnor is required to serve a notice of acquisition. EDPL Sec. 502.

If it is a Supreme Court condemnation, the Eminent Domain Procedure Law provides that the condemnees shall, on a date specified in the order granting the petition, file a written claim or a notice of appearance. The time to file a claim or notice of appearance is not defined. Rather, the law states that the vesting order shall specify the time to file. EDPL Sec. 502, Subd. (B)(4). This creates an unnecessary problem.

Some condemnors unfairly limit the time period. We have observed vesting orders limiting the time to file a claim to 90 days as if they were tort claims. A short time to file is improper in a constitutionally protected claim for just compen-

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sation. Most justices sitting in the Condemnation Part will change the period to file a claim or appearance to three years.

The Appellate Division, Second Department, has noted on several occasions, that a condemnation matter is not private litigation. *Yaphank Dev. Co. v. County of Suffolk*, 203 AD2d 280 [2d Dept. 1994]. Also see *Matter of Staten Is. Bluebelt Phase 2 (Hasson)*, 108 AD3d 773 [2d Dept. 2013].

In a condemnation proceeding commenced in Supreme Court, the

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court is to provide the time to file a claim or notice of appearance. In *Grandinetti v. Met. Transp. Auth.*, 74 NY2d 785 [1989], the Court of Appeals stated at Page 787,

Contrary to the conclusion of the Appellate Division (139 AD2d 619, 621), the time specified by the court pursuant to this provision is not a Statute of Limitations. Nor is it a condition precedent compliance with which is ordinarily deemed a necessary element of the claim. Statutes of Limitations and conditions precedent are, in most instances, specific legislatively prescribed restrictions on a party's ability to recover on a claim. A time period that is variable and involves a discretionary judicial weighing of a number of pertinent factors on a case-by-case basis does not fall within this category. Instead, the filing deadline contemplated by

EDPL 503(B) is merely a procedural direction to be issued by the court in the exercise of its broad discretion to administer the litigation in an orderly and expeditious manner. As such, the court may extend the time fixed by its own prior order "upon such terms as may be just and upon good cause shown" (CPLR 2004).

But the Court of Appeals held in the *Grandinetti* case that if an application had to be filed for an untimely claim, the moving party must provide an affidavit of reasonable excuse for the failure to meet the filing deadline and an affidavit of merit. If that is done and the former property owner was involved in litigating the claim, the court could certainly exercise its discretion in allowing a late claim. *Matter of County of Orange v. Monroe Bakerstown Rd. Realty*, 91 AD3d 772 [2d Dept. 2012].

The time to file a de jure claim is dependent on whether a property owner has reasonable notice of the taking. As Judge Benjamin Cardozo stated in *Matter of City of New York*, 212 NY 538, "[b]efore the citizen's right to compensation can be cut off by such a statute of limitation, notice of the event on which the right depends must be brought home to him by the State. He cannot be charged with the duty of hunting out the facts for himself."

When we studied due process in our constitutional law course in law school, we read the Supreme Court's decision in *Schroeder v. City of New York*, 371 U.S. 208 [1962].

In *Schroeder*, the city was initially successful in having a condemnation claim involving a one-family home and three and a half acres in Orange County, N.Y., dismissed. The city published notice of the proceeding, but otherwise gave no other notice to property owner. The New York City statute had a three-year statute of limitations.

The property owner brought suit claiming that she knew nothing about the condemnation claim, or of her right to claim. Her claim was held as barred by the statute of limitations.

# Time to File

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The Supreme Court held that the newspaper publication did not measure up to the quality of notice which the Due Process Clause of the Fourteenth Amendment required. The court noted that the city may have posted some signs on trees and poles, but that did not constitute personal notice. *Schroeder* holds that a condemnee cannot be held to a three-year statute of limitations for a taking which the condemnee does not know about.

Another interesting case is *Parthen v. State of New York*, 99 AD2d 922 [3d Dept. 1984]. In *Parthen*, the claimant timely filed in the Court of Claims following personal service of a Notice of Appropriation in 1978. During the trial, the claimant first learned that the state had made a prior appropriation in 1971

but did not personally serve notice of the earlier taking. The Third Department affirmed the trial court's amendment of her claim to include the 1971 taking.

## The De Facto Taking

The de facto or inverse condemnation presents a much more intellectually challenging situation.

If an owner discovers that its property was taken without a formal proceeding, it is a de facto condemnation. Here it is appropriate to note the difference between trespass and a de facto taking. A trespass is temporary in nature. A de facto taking is a permanent ouster of the owner. Generally, the government or entity with the power of eminent domain does not trespass, it takes de facto.

If the intrusion is so extensive in scope or duration that it may be regarded as a taking in fact, the

right to compensation under eminent domain can be invoked. *Matter of O'Brien v. City of Syracuse*, 54 AD2d 186 [4th Dept. 1976], *apl. dism.*, 41 NY2d 1008 [1977].

Damages in a de facto taking, including interest, are to be awarded based on the property's value on the earlier date of entry.

The Court of Appeals has held that a de facto claim may be filed when a claimant is aware of the extent of the taking. In *Leeds v. State of New York*, 20 NY2d 701 [1967], a nine-year-old de facto claim was held timely because claimant did not know the extent of the taking and was not served with Notice of Appropriation.

The converse is also true. If an owner knows its property has been taken, it must act to protect its rights. In general, there is a three-year statute of limitations. CPLR Sec. 214(4). This statute has been imposed in two cases—from 2010

and 2012—where the plaintiffs had actual knowledge of the taking. *Corsello v. Verizon*, 77 AD3d 344 [2d Dept. 2010], *aff'd* 18 NY3d 777 [2012] and *Sarnelli v. City of New York*, 256 AD2d 399 [2d Dept. 1998].

It is important to note in *Corsello*, the plaintiff knew, indeed alleged, that the rear wall terminal was affixed by Verizon 20 or more years before they commenced their action. 77 AD3d 344, 348.

In the *Sarnelli* case, the land area was cleared of trees and used to construct six subway tracks in 1983. "Plaintiffs were denied access to it except for a single occasion in 1992 or 1993." 256 AD2d 399, at p. 399. The lawsuit was commenced 10 years after plaintiffs had knowledge of the taking.

The important take-away is that if a condemnor has taken your property without a formal condemnation, you should move immediately to protect your rights.