S188128

ORIGINAL

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORATION AUTHORITY

Plaintiff and Appellant

v.

Alameda Produce Market, LLC, ~~VCC ALAMEDA, LLC., a California limited liability company~~, et al.,

Defendants and Respondents ~~and Petitioner~~

Court of Appeal
Case No. B212643

Los Angeles Superior Court
Case No. BC 313 010

SUPREME COURT
FILED

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Deputy

Appeal From a Judgment by
The Honorable James R. Dunn
Judge of Los Angeles Superior Court

PETITION FOR REVIEW OF A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Alameda Produce Market, Inc. (APMI) petitions for review of the decision of the Court of Appeal, Second District, Division Four, reversing the dismissal order of the Superior Court of Los Angeles County (the Opinion, filed on October 6, 2010 is attached as Exhibit A).

This decision holds that the fundamental right of the property owner to challenge the taking of its property can be waived by a lender defendant, acting on its own behalf pursuant to its rights under a deed of trust and the eminent domain law to apply for withdrawal of a portion of the deposit of probable compensation, to which withdrawal the condemnor gives specific consent.

While the trial court refused to accept this defense of a third-party waiver, the appellate court held it was a proper defense and reversed the trial court's dismissal of the action under the right to take challenge. The appellate court relied on *Redevelopment Agency v. Mesdaq* (2007) 154 Cal. App.4th 1111, that the lender's receipt of deposited funds constituted a waiver for all parties defendant. Code of Civil Procedure section 1255.260 provides that the waiver of all claims other than greater compensation applies only to the "persons receiving" payment of funds from deposit of probable compensation. The appellate court circumvented explicit and plain wording of the statute, by concluding that the owner received the benefit of a reduction on the amount owed on the loan on its property. That coupled with

the owner's failure to object to the lenders' withdrawal applications and stipulations with the condemnor resulted in waiver.

The owner's right to take victory was snatched away on appeal based on the action of a third party looking out for its own interest.

In today's real estate world, most properties are encumbered by financing. The Opinion has the effect of taking the decision of challenging the right to take from the owner and placing it in the hands of the lender.

The statute provides no indication of such intent to limit the owner's right.

I. ISSUES PRESENTED

1. On what basis can an owner object to a lender withdrawing a portion of the deposit of probable compensation in order to preserve the owner's right to take challenge under Code of Civil Procedure section 1255.260.[1]

2. Whether under section 1255.260 the withdrawal of a portion of the deposit by a lender can be transformed to a waiver by the owner under the "acceptance of the benefit" theory.

3. What is the appropriate standard for waiver under section 1255.260.

II. GROUNDS FOR REVIEW

This case presents the improbable result that the owner does not control its own defense in a condemnation action to take its property. The core issue is whether a property owner who has valid grounds for objecting to the right to take and prevails (in this case, the challenge was validated by the trial court below) can be deprived of that right and favorable ruling,

[1] All statutory references hereafter are to the Code of Civil Procedure unless otherwise stated.

because a lender acting pursuant to rights in its deed of trust was granted permission by the condemnor to withdraw a portion of the deposit.

It is a case of *waiver by association.*

III. SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED

First. There is strong need for judicial guidance on what constitutes a waiver of an owner's right to take challenge under section 1255.260. In a condemnation action, the rights of the owner are paramount.

Second. The Opinion conflicts with the plain and literal meaning of section 1255.260 which only provides the application of waiver against the party withdrawing funds from deposit.

Third. How can an owner preserve its right to take challenge, when a lender-defendant applies to withdraw a portion of the deposit of probable compensation to which it is entitled under Eminent Domain law as well as its deed of trust.

Fourth. The ruling of *Redevelopment Agency v. Mesdaq* (2007) which the Appellate Court relied on, is in conflict with other decisions in eminent domain clearly differentiating the rights of the property owner from other independent defendant interests in the condemnation action. See *Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357.

Fifth. Although the decision below is unpublished, it signals an impediment to all property owners, who have financed their real estate investment of a home, business or farm, asserting a right to take challenge in a condemnation action.

IV. STATEMENT OF FACTS

A. APMI's Challenge to the Validity of the Resolution of Necessity

As is usually the case for challenges to the right to take, the resolution of necessity is the focus of attention.

APMI's answer to the complaint in eminent domain raised numerous objections to the right to take (1 JA 0144-0149). Its primary challenge was to the validity of the Resolution of Necessity, that MTA had failed to adopt a resolution of necessity in conformance with the requirements of the California Eminent Domain Law (Code of Civil Procedure section 1250.370 subdivision (a).)

The resolution must contain what is known as the public necessity findings which must be established by the condemnor in order to acquire private property by eminent domain. (Sections 1240.030, 1240.040, 1245.220, and 1245.230.) The findings are that: (1) the public interest and necessity require the proposed project, (2) the proposed project as planned is located in the manner most compatible with the greatest public good and the least private injury, and (3) the property is necessary for the proposed project. (Sections 1245.230, 1240.030, and 1245.250.)

Here, the resolution of necessity adopted by the Board of the Los Angeles County Metropolitan Transportation District (MTA) contained a significant amendment deviating from the statutory, required findings. The amendment specifically conditioned the adoption of the resolution on a command to staff "to negotiate with appropriate property owners for the development of adequate, mutually agreeable parking." (JA 0024.) A highly unusual resolution; the amendment contradicts the findings of necessity to acquire the property. The findings of necessity cannot be conclusive

because the resolution directs Plaintiff to negotiate with property owners in order to arrive at a project which causes the least private injury.

B. MTA's Prejudgment Possession of the Property

MTA acquired prejudgment possession of the AMPI's property on November 4, 2004, nine months from the date of filing its complaint in eminent domain. It obtained possession under what is known as the "quick take procedure" (Section 1255.410). MTA made the required deposit of the probable amount of just compensation and filed an application for order of immediate possession of the property on April 1, 2004. (1 JA 0015-0016.)

C. MTA and Lenders Stipulation for Withdrawal

There were three deeds of trust on the property. The lenders who are holders of these deeds of trusts, VCC Alameda LLC, NAMCO and California National Bank, are all Defendants in the condemnation. The lenders filed applications for withdrawal of a portion of the deposit, of which APMI received notice. (1 JA 0043-0052, 1 JA 0074-0138; 1 JA 0063-0067.)

APMI did not object to the withdrawal, for the simple reason that it had no legal or factual basis to object. From its perspective, the lenders were defendants in the condemnation action given their security interest in the property and they had the right under section 1255.210 to withdraw a portion of the compensation on deposit to satisfy their outstanding liens. Moreover, the lenders were entitled under their deeds of trust to the monies to satisfy the outstanding debt secured by the property.

MTA proceeded to enter into a Stipulation and Proposed Order for the Withdrawal of Probable Just Compensation with the three lenders, which was filed on June 10, 2004 (1 JA 0172-JA0179). The Opinion includes a full citation to the stipulation, specifically noting the statement that "APMI is not

objecting to the instant withdrawal of funds." (Opinion, pp. 4-5.) But, APMI was not a party to the stipulation.

Knowing the owner had a pending right to take challenge, MTA nevertheless entered into the stipulation with the lenders for the withdrawal of most of the deposit. MTA explains that it "had no legal basis (and, more importantly, no reason) to object to the lenders' withdrawal." (Appellant's Reply Brief at p. 11.)

As to the lenders' withdrawal, the owner and MTA are of the same position that they had no legal or factual basis to challenge this withdrawal of a portion of the deposit.

MTA later increased its deposit by an additional $2.4 Million in October 2004. These monies remain on deposit. APMI has not withdrawn any portion of the deposit of probable compensation.

D. Right to Take Trial – Conditional and Permanent Dismissal

The trial court conducted a right to take trial for both APMI's and American Apparel's challenge to MTA's right to take for failure to adopt a valid resolution of necessity that met the requirements of section 1250.370(a).

The MTA, in its defense, argued that the owners had waived their right to take challenge under section 1225.260 as a result of the lenders' withdrawal of a portion of the deposit.

The trial court ruled that the Resolution of Necessity contained a condition in the form of an amendment to the Resolution, rather than merely a directive to staff, which committed the LACMTA to negotiate further with the appropriate defendants for a plan of mutually agreeable parking. (4 JA 1114-1117.) The trial court entered a conditional dismissal on July 12, 2006, requiring MTA to enter into good faith negotiation with APM and American

Apparel. (4 JA 1118-1122.) The trial court did not rule on MTA's statutory waiver defense in rendering its conditional dismissal. (4 JA 1114-1117.)

Negotiations were held over a sixteen-month period with the Hon. John Zebrowski, retired appellate justice, appointed as referee. Justice Zebrowski concluded in his report to the trial court that MTA staff had failed to negotiate in good faith with the neighboring property owners as required by the resolution of necessity. (5 JA 1215-1216.)

As a result of the failed negotiations and Justice Zebrowski's report, the trial court entered an order on September 5, 2008, making its Conditional Dismissal a Permanent Dismissal. (7 JA 2015-2017.) The trial court in denying MTA's motions for a new trial ruled on its statutory waiver claim under section 1255.260 and distinguished the *Redevelopment Agency of the City of San Diego v. Mesdaq* (2001) 154 Cal.App.4th 1111. The trial court found that APMI's receipt of the funds did not result in waiver under section 1255.260 because, unlike the owners in *Mesdaq*, APMI did not explicitly consent to the lenders' withdrawal. (Opinion at p. 9.)

E. <u>The Court of Appeals' Opinion</u>

MTA appealed the dismissal on the primary ground that the lenders' withdrawal of a portion of the probable compensation on deposit acted to waive the owners' right to take challenge under section 1255.260. The Appellate Court concluded that neither APMI nor American Apparel had standing to challenge the taking of the property, that APMI statutorily waived all claims and defenses other than a claim for greater compensation under section 1255.260 and American Apparel had no legal or equitable interest in the property. (Opinion at p. 2.)

The Appellate Court held that "the evidence was sufficient as a matter of law to establish that APMI's acceptance of benefits was voluntary".

(Opinion at p. 14.) The evidence on which the court relied in finding statutory waiver based on "acceptance of the benefits" was limited to the following:

a) APMI had notice of the lenders' request.

b) APMI did not object to the lenders' withdrawal. (Opinion at p. 14.)

The Appellate Court also ruled there was no basis to distinguish the case from *Mesdaq* finding that the "lenders' withdrawal and use of the deposited funds to pay APMI's loan was indistinguishable from APMI's receipt of the funds, and therefore resulted in a waiver of APMI's claims and defenses other than a claim for greater compensation. (Opinion at p. 14.)

The Appellate Court reversed the order of dismissal in its entirety.

V. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW REGARDING THE STATUTORY WAIVER OF THE OWNER'S RIGHT TO TAKE CHALLENGE

California Rules of Court, Rule 8.500(b)(1) provides that review by the Supreme Court will be granted where it appears "necessary to secure uniformity of decision or settlement of important questions of law." These important policies are presented in this case. The case raises important issues of Eminent Domain law on the competing rights and interests of an owner and lender when the owner challenges the right to take.

A. WHETHER A PROPERTY OWNER WHO HAS NO LEGAL BASIS TO OPPOSE A LENDER'S WITHDRAWAL OF DEPOSIT NONETHELESS MUST FILE AN OBJECTION

1. <u>There was No Legal Basis for the Defendant Owner to Object to the Lender's Withdrawal.</u>

The owner did not object to the withdrawal of deposit by three lenders (VCC Alameda LLC, California National Bank and Namco Capital Group) who had notes and deeds of trusts on the property, because there were no

legal grounds to object. But, the appellate court nevertheless found that the owner's failure to object resulted in a waiver of the right to challenge the take.

Section 1255.210 provides that any defendant may apply for withdrawal of the funds on deposit and section 1255.220 authorizes the court to order payment of the amount the applicant is entitled to receive. The lenders were legally entitled to withdraw that portion of the compensation deposited to satisfy the lenders' outstanding liens on the secured property.

Plaintiff's statutory notice to APMI of the lenders' applications stated that "any objection shall state the nature of the objection and the factual and legal basis therefore." (1 JA 0064.) There was no factual or legal basis to object to the withdrawal made under the deeds of trust. APMI did not dispute the amounts owed to the lenders or that the mortgages were secured by the property.

However, the Stipulation for Withdrawal between MTA and the lenders demonstrates that MTA agreed to the lenders' right as defendants in the condemnation action with secured interests in the property to withdraw a portion of the deposit. MTA admits that it had no legal basis to object to the lenders' application for withdrawal. (Appellant's Reply Brief, p. 11.) This right to satisfy the lenders' deeds of trust stood regardless of APMI's position on the withdrawal.

In condemnation cases, where the owner has a right to take challenge, the owner and the lenders have competing rights and interests. APMI's right to take challenge is a separate and distinct claim from that of the defendant lenders, which are merely seeking to be compensated by the condemnor in amounts to satisfy their deeds of trust on the property, given the property securing the loan is being taken and the owner dispossessed.

Importantly, APMI's right to take challenge also does not constitute a ground to object to the lenders' withdrawals of deposit. There is no case or statute precluding a defendant lender from withdrawing compensation from the deposit to satisfy its lien, because of a challenge by the owner to the right to take. MTA by entering into the stipulation with the lenders, knowing of APMI's right to take challenge presumably reached the same conclusion – there was no factual or legal objection to preclude the lenders' withdrawal, even in the face of an owner's right to take challenge.

APMI was not a party to the stipulation and cannot be bound by the contended consequences of the withdrawals made by independent defendants protecting their own financial interests. These defendants-lenders were not participants in the right to take challenge. In *Redevelopment Agency of the City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, the court ruled that a tenant who sought compensation for loss of business goodwill to its Valu-Mart store was not bound by the stipulated judgment between the Redevelopment Agency and the land owner. In pursuing its goodwill claim, the business owner could disagree with the condemnor's and owner's stipulation as to the highest and best use of the property, in contending that the current use of its business would continue on the property. *Id.* at 368-369.

2. **Owner's Precondemnation Contractual Obligation With Lenders Prevented it from Objecting to the Withdrawal**

AMPI, as trustor under the deeds of trust, was contractually bound by the terms of the indebtedness documents which would preclude AMPI from objecting to the lenders' seeking payment for their liens through the eminent domain withdrawal of deposit process.

The Opinion cites to certain terms of California National Bank's promissory note, which establish that the lender had a contractual right to withdraw a portion of the deposit regardless of the owner's consent. (Opinion at p. 5, fn 6.) Its entitlement was not limited to only the compensation award. The notes states that it was entitled to "all . . . compensation, awards and other payments or relief." (Opinion, *ibid.*) Further, independent of the owner, the bank was "entitled to commence, appear in and prosecute any action or proceeding or to make any compromise or settlement."[2] (Opinion, *ibid.*) AMPI would be in violation, in breach of the terms of the promissory note and deed of trust, if it were to object to California National exercising its rights in the eminent domain action to withdraw funds to satisfy its lien.

MTA disputed whether AMPI's indebtedness documents with Namco and VCC Alameda would have prohibited AMPI from objecting to the lenders' withdrawal, but there is no record of that. Common sense and the law on mortgages and deeds of trust and eminent domain dictate that the trustor would not have the right to preclude the trustee and beneficiary from exercising their right of withdrawal under section 1255.210.

A lien is defined in eminent domain law as "a mortgage, deed of trust, or other security interest in property whether arising from contract, statute, common law or equity." Section 1265.210. The law is clear that the beneficiary of a deed of trust on property sought to be condemned has a compensable interest in an eminent domain proceeding as to the property. *People ex rel Dept. of Transportation. v. Redwood Baseline, Ltd.* (1978) 84 Cal.App.3d 662, 670.

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[2] Similar entitlement terms are found in the deed of trust. (1 JA 0084-0108.)

3. Civil Code Section 2929 Precludes Owner From Objecting to Lenders' Withdrawal

If the trustor, APMI, had sought to prohibit the lenders from exercising their right of withdrawal, it would be acting in violation of its statutory obligation under Civil Code section 2929. This section states "No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." Prohibiting the lenders from satisfying the payment of their liens on the property, where the owner is no longer in possession of the secured property, impairs the lenders' security in violation of Civil Code section 2929.

4. Duty to Object to Withdrawal of Deposit is on the Plaintiff.

The appellate court placed the duty to object to the withdrawal on the defendant owner. The duty was misplaced. Code of Civil Procedure section 1255.230 puts the right to object on the plaintiff.

The plaintiff is the rightful owner of the deposit, until judgment awarding the probable compensation is made. Logically, the duty to object to any withdrawal of the deposit should be on the condemnor who is the owner of the deposit and who is seeking to extinguish all interests in the property. Under *Metropolitan Water District v. Adams* (1948) 32 Cal.2d 620, 627, MTA owned the deposit. Thus, it has the duty to ensure that the deposit is properly used and not APMI who is one of several co-defendants with a future potential interest in the deposit. MTA was a party to the Stipulation for Withdrawal not APMI.

The appellate court here, as well as in *Mesdaq,* is operating under the assumption that an owner has veto or objection rights superior to all co-defendants when it comes to an application for withdrawal of the probable compensation. From this faulty analysis of the statute the appellate court *created* a duty to object on the owner, when in fact the Legislature has

explicitly placed the duty to object on the condemning agency. Such an outcome cannot be supported by Chapter 6, Article 2 of the Eminent Domain Law which deals with the withdrawal of the deposit. All parties with any interest in the land are actually co-defendants with equal rights under the law. Section 1250.230.

Section 1255.210 specifically states that "any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited. . . . The applicant shall serve a copy of the application on the *plaintiff*." (Emphasis added.) Thus, the law is clear that *any* defendant with *any* compensable interest in the property may make an application and pursuant to section 1255.210. And, the court's duty is mandatory as to all applicants. "The court shall order the amount requested in the application, or such portion of that amount as the applicant is entitled to receive, to pay to applicant." Section 1255.220.

Section 1255.230 is entitled "Objections By Plaintiff", clearly placing the duty to object on the plaintiff. Section 1255.230(b) permits the plaintiff to file objections. Section 1255.230(3)(c) states that the parties served with a notice of withdrawal "shall have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants." The limitation of the waiver as only to the "extent of the amount withdrawn" is also repeated in the notice of withdrawal served by MTA. (1 JA 0064.) While section 1255.230(d) discusses what the court should do if a party objects it does create a duty to object where the defendants are not arguing over what is due each defendant.

Furthermore, section 1255.250 anticipates multiple applicants filing an undertaking in favor of the plaintiff where the amount withdrawn exceeds the amount of the original deposit. Thus the Eminent Domain law, in dealing

with withdrawal of a deposit, consistently differentiates between each defendant and their own interests and does not treat the deposit as the sole property of the fee owner.

The appellate court failed to recognize that the lenders' right to seek withdrawal for the lenders' interest is independent of APMI's interest and APMI's right to challenge the take. To read section 1255.260's waiver provision to bind a defendant distinct from the defendant who receives the money is inconsistent with the legislative intent. For example, in sections 1250.350 – 1250.370 the Legislature has granted "a defendant" the right to object to the plaintiff's right to take. The only way to harmonize the right to take statute (section 1250.360) with the withdrawal of deposit statutes is to permit each defendant to have its own rights to seek deposit through application for withdrawal as well as to permit each defendant to have its own right to object to the taking. There is no logic in allowing one defendant's withdrawal of deposit which it is legally entitled to seek to preclude a different defendant from objecting to the right to take which it is legally entitled to do. This results in an unfair process which the Legislature could not have intended to have created.

It is not uncommon in an eminent domain action to have numerous defendants with different and competing, interests and claims in the property, such as a public utility with an easement, a tenant with a lease that has bonus value or different co-owners some of who object to the right to take while others do not. In *Ventura County Flood Control Dist. v. Campbell* (1999) 71 Cal.App.4th 211, 216-217, one joint tenant in property held in an undivided interest entered into a stipulated judgment in condemnation with District to relinquish their one-half interest in land, while another co-owner prosecuted a cross-complaint seeking declaratory and injunctive relief,

asserting violations of due process, equal protection, civil rights and unjust enrichment.

B. CLARIFICATION BY THE SUPREME COURT OF THE APPROPRIATE STANDARD FOR WAIVER UNDER SECTION 1255.260 IS NEEDED

At the heart of the opinion is the ruling that APMI has waived its right to take challenge by failing to object to lenders' application for withdrawal and subsequent Stipulation to Withdraw between the lenders and MTA. APMI had no duty to object under the statute as discussed above. Moreover, the Appellate Court's finding of waiver is not consistent with the California law on the subject as the necessary elements to constitute waiver are not present in this case.

The basis for the Appellate Court's finding that APMI voluntarily waived were that APMI had notice of the lenders' applications for withdrawal and it did not object. (Opinion, at p. 14). But, the duty to object is on the condemnor and not on a co-defendant. In this case the court turned the statute on its head by placing the duty of one defendant to object to another defendant's statutory right to seek withdrawal for its interest.

APMI's failure to object for granting the stipulations cannot support a finding of a waiver since "waiver refers to act or consequences of the act, of one side. Waiver does not require any act or conduct by the other party." *Oakland Raiders v. Oakland – Alameda County Coliseum, Inc.* (2006) 144 Cal.App.4th 1175, 1189 – 1190. Thus, the Appellate Court's reliance on recitation in other parties' pleadings cannot constitute a waiver of a non-participant.

There are basically three elements required to make a finding of waiver. Waiver is (1) intentional relinquishment or abandonment of a (2)

known right or privilege (3) with full awareness of the facts and likely consequences. *Roberts v. Superior Court* (2002) 27 Cal.4th 793, 806-807. "All case law on the subject of waiver is unequivocal: 'waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.'" Thus, the pivotal issue in a claim of waiver is the "intent of the party who allegedly relinquished the known legal right." *DRG/Beverly Hills Limited v. Chop Stix Dim Sum Café* (1994) 30 Cal.App.4th 54, 60-61; *Waller v. Truck Ins. Exchange, Inc.,* (1995) 11 Cal.4th 1, 31.

The proper inquiry must be whether APMI had a full understanding that it had a duty to object to other co-defendants with legal interests in the property and that failure to object to other co-defendants' requests would jeopardize APMI's defenses to the right to take. APMI's conduct would indicate that it had no such knowledge since it left the amount due it on deposit so as to not jeopardize its ability to pursue its right to take objections.

Nor can it be argued that APMI knew the consequences of not objecting to another defendant exercising its own statutory right to apply for a withdrawal. Here the owner defendant did not receive any payment and expressly left the remaining amount on deposit so that it could pursue its challenge to the right to take, while the lender-defendant decided to exercise its independent right under the withdrawal provisions of the Eminent Domain law. There was no intent by APMI to waive its right to take objections.

C. SECTION 1255.260 EXPLICITLY PROVIDES THAT ONLY THE PERSON RECEIVING PAYMENT FROM THE DEPOSIT WAIVES ITS CLAIMS OR DEFENSES OTHER THAN THE RIGHT TO GREATER COMPENSATION

The Legislature chose very plain and unambiguous words for the waiver of defenses upon withdrawal of deposit. Section 1255.260 states:

> "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."

The statute focuses on the person receiving the funds. It does not say that if any defendant receives such payment, there is a waiver on behalf of all defendants of all defenses except a claim for greater compensation. The statute did not anticipate the situation presented by this case. Only the owner's withdrawal can waive its right to take challenge. As this court observed in *Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648, 659, fn. 6, in reviewing the legislative history of the section, observed: "*California owners* wishing to withdraw compensation have been required to waive claims and defenses, with the exception of a claim for greater compensation, since 1897." (Emphasis added.)

Moreover, MTA took possession. The owner having lost control of the land, there was no opportunity for it to derive income from the property to meet its monthly loan obligations. MTA had the benefit of possession and the lenders exercised their rights to access to the funds deposited to pay down their deeds of trust.

Other eminent domain appellate decisions recognize the distinction of parties. See *Ventura County Flood Control District v. Campbell* (1999) 71

Cal.App.4th 211, discussed above. The settlement by one owner of an undivided fee interest did not preclude the other owner going forward with trial on its claims and defenses – violation of substantive due process, violation of civil rights and failure to comply with CEQA, all of which are right to take challenges.

D. THE APPELLATE COURT INCORRECTLY APPLIES AN "ACCEPTANCE OF BENEFIT" THEORY OF WAIVER

It is not disputed that a party appealing an order or judgment cannot both accept the money awarded under such judgment and appeal the judgment from which it is already taking the benefit. The "acceptance of benefits" in such a situation is both knowing and deliberate. This principle has been applied in to a party's right to trial but not to waiver of a defense in an eminent domain case.

The Appellate Court has introduced an "acceptance of the benefits" element which normally relates to partial acceptance of a judgment or order by a party to the judgment or order. In this case the order of withdrawal was between other defendants and MTA not APMI.

APMI has refused to withdraw the remaining $2.3 Million during the term of this litigation. The so called benefit received by APMI has been involuntary. MTA and the three lenders acted in concert for the funds to be withdrawn from deposit and *paid to the lenders*, not the owner APMI.

The lenders had the right under their deeds of trust to seek repayment of their loans from the condemnation deposit. APMI had no legal basis for contesting such payment.

"Acceptance of benefits" has never been applied to the involuntary acceptance of benefits. APMI had no power or legal right to prevent its lenders from taking their action.

MTA had grounds to object or protect itself by asking the court to impose a bond for repayment. If plaintiff's right to take were defeated, it would have to pursue the lenders to recover the funds withdrawn. Of course, the law recognizes MTA's right to do so in Code of Civil Procedure section 1268.160.

MTA knew that APMI was diligently pursuing its right to take challenge. The law requires a clear and unequivocal indication of intent to waive rights of appeal by accepting the benefits. In *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1506, the defendant did not waive its right of appeal by accepting a distribution of a portion of the proceeds to which it was entitled, but sought a greater share of the award on appeal. The defendant's rights were "preserved" by consistently pursuing his objections to the trial court's rulings.

E. THE *MESDAQ* HOLDING DOES NOT REJECT THE "KNOWING AND INTELLIGENT" WAIVER STANDARD

The decision in *Mesdaq* which came down three years into the present litigation is the only case that held the withdrawal of funds by a lender may act to waive the property owner's right to challenge the taking of property by condemnation. That case presented a unique fact situation in which the lender entered into a stipulation with the owner, limiting the lender's right to condemnation proceeds to come out of the ultimate award, not the deposit. *Id.* at 1138.

The existence of this stipulation provided the owner with the legal ground for objecting to the lender's application to withdraw funds from deposit. Instead, owner stated that he was "not objecting to the withdrawal of the outstanding mortgage amount plus interest." *Id.* at 1139.

The *Mesdaq* court paid special attention to the owner's "explicit consent" and the lender's lack of legal right to those funds without such explicit consent. *Id.* at 1140. And in footnote 20 the court notes that a different ruling might result where the owner did not consent to the withdrawal by its lender:

> "We express no opinion on the question of whether Mesdaq would have waived his right to challenge the taking on appeal if the trial court had permitted FNB to withdraw the deposit over Mesdaq's objection."

The *Mesdaq* court was unwilling to reject entirely the concept of "a knowing and intelligent waiver", as followed by the trial court in this case.

The *Mesdaq* decision was new law; it expanded on the plain wording of the statute. All prior cases under the statute involved an owner making the withdrawal.

VI. CONCLUSION

Owners of real property who are subjected to the power of eminent domain to take their land are entitled, under Article 19, Section 1 of the California Constitution, to contest the right of the condemning agency to take the property and/or just compensation for the land taken.

This petition asks the Supreme Court for guidance on the issue of whether a third-party defendant, by withdrawing a portion of the deposit to satisfy its lien, can take away from the owner the right to challenge the taking.

The Appellate Court created a waiver on behalf of the property owner that was never made.

Respectfully submitted,

Dated: 1/12/10

MATTEONI, O'LAUGHLIN & HECHTMAN

Norman E. Matteoni
Peggy O'Laughlin
Gerry Houlihan
Attorneys for Petitioner

CERTIFICATION OF THE NUMBER OF WORDS CONTAINED IN THIS PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL, SECOND DISTRICT, DIVISION 4

I certify that I am one of the appellate counsel responsible for the preparation of the foregoing petition for review of a decision by the Court of Appeal, Second Appellate District, Division Four, and that it contains 6,418 words based on the word count of the computer program used to prepare it.

Dated: November 12, 2010

Peggy M. O'Laughlin

PEGGY M. O'LAUGHLIN

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner

Court of Appeal Case No. B212643

Los Angeles Superior Court Case No. BC 313 010

DECLARATION OF SERVICE

I, Mary Anne Anaya-Rojas, hereby declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within action. I am employed in the County of Santa Clara; my business address is 848 The Alameda, San Jose, CA 95126

On November 12, 2010, I served the within:

1. **PETITION FOR REVIEW OF A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4**

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

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☒ VIA EXPRESS CARRIER: I caused such documents to be collected by an agent for Federal Express to be delivered to the offices of the stated parties.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made, and that this declaration was executed at San Jose, California.

Mary Anne Anaya- Rojas

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner

Court of Appeal Case No. B212643

Los Angeles Superior Court Case No. BC 313 010

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Filed 10/6/10 Los Angeles County Met. Transp. Auth. v. Alameda Produce Market CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Plaintiff and Appellant, v. ALAMEDA PRODUCE MARKET, LLC, et al., Defendants and Respondents.	B212643 (Los Angeles County Super. Ct. No. BC313010)

APPEAL from an order of the Superior Court of Los Angeles County, James R. Dunn, Judge. Reversed and remanded.

Jones Day, Elwood Lui, Brian M. Hoffstadt, and Brian D. Hershman; Robert E. Kalunian, Acting County Counsel, Charles M. Safer, Assistant County Counsel, and Joyce L. Chang, Principal Deputy County Counsel, for Plaintiff and Appellant.

Oliver, Sandifer & Murphy, Connie Cooke Sandifer, and Cynthia C. Marian for Defendant and Respondent Alameda Produce Market, LLC.

No appearance for Defendant and Respondent American Apparel.

Plaintiff Los Angeles County Metropolitan Transportation Authority (MTA) appeals from the order dismissing its eminent domain complaint. MTA contends that the order of dismissal must be reversed because neither defendant had standing to challenge the taking of the property. MTA argues that defendant Alameda Produce Market, Inc. (APMI), which owned the property, statutorily waived all claims and defenses other than a claim for greater compensation under Code of Civil Procedure section 1255.260,[1] and that defendant American Apparel, Inc., which used the property for overflow employee parking, had no legal or equitable interest in the property. We conclude that MTA is correct on both points. Accordingly, we reverse the order of dismissal and remand for further proceedings.

BACKGROUND

In 1996, the federal court issued a consent decree that required MTA to improve the quality of bus service in Los Angeles. In January 2004, the federal court ordered MTA to place an additional 145 buses in service by December 2004. Because its existing facilities were insufficient to accommodate the additional buses and employees necessitated by the order, MTA decided to expand its downtown Los Angeles Division I facility by acquiring APMI's nearby property, which consists of "approximately 115,000 square feet of vacant and undeveloped contiguous parcels generally located at 1345 East 7th Street in the City of Los Angeles" (the property). According to MTA's Tim Lindholm, the property is a "key component" of the Division I expansion project.

On March 25, 2004, MTA's governing board adopted a resolution of necessity that authorized the taking of the property for the Division I expansion project. On April 1,

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1 All further statutory references are to the Code of Civil Procedure.

Section 1255.260 provides: "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."

2004, MTA filed the instant complaint against APMI[2] (erroneously sued as Alameda North Parking, Inc.) to acquire the property by eminent domain. MTA utilized the quick-take procedure by depositing $6.3 million as the probable amount of compensation and filing a motion for immediate possession of the property. (See § 1255.410;[3] *Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, 1120-1122 (*Mesdaq*) [quick-take procedure explained].)

In its answer to the complaint, APMI raised numerous objections to the taking of the property. In particular, APMI objected that MTA had failed to adopt a valid resolution of necessity that satisfied the requirements of the eminent domain law. (§ 1250.370, subd. (a).) As will be discussed, APMI ultimately prevailed on this objection at trial, which resulted in the dismissal of the complaint.

Before trial, MTA notified the interested parties of its deposit of probable compensation. (§ 1255.020.) In response to the notice, three lenders with liens against the property (VCC Alameda, LLC, California National Bank, and Namco Capital Group) (the lenders) applied to withdraw a portion of the deposited funds. (§ 1255.210.) MTA objected to the lenders' applications for withdrawal of the deposit on the ground that there were other interested parties. MTA served the other interested parties with notice

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2 The complaint identified VCC Alameda as the owner of the property. However, VCC Alameda had transferred the property to APMI on March 31, 2004, the day before the complaint was filed.

3 Section 1255.410, subdivision (a) provides in relevant part: "At the time of filing the complaint or at any time after filing the complaint and prior to entry of judgment, the plaintiff may move the court for an order for possession under this article, demonstrating that the plaintiff is entitled to take the property by eminent domain and has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article. [¶] . . . The motion shall include a statement substantially in the following form: 'You have the right to oppose this motion for an order of possession of your property. If you oppose this motion you must serve the plaintiff and file with the court a written opposition to the motion within 30 days from the date you were served with this motion.'"

of the right to object to the lenders' applications for withdrawal, and requested that the trial court determine the appropriate amount of any withdrawal of the deposit. (§ 1255.230, subds. (c), (d).)

APMI, which received notice of the lenders' applications for withdrawal of the deposit, did not object to the lenders' withdrawals. On the contrary, APMI's Miguel Echemendia[4] signed the verified applications for withdrawal of VCC Alameda and Namco. VCC Alameda's counsel filed a declaration stating that APMI's counsel did not object to the lenders' withdrawals of the deposit.

The lenders signed a stipulation with MTA regarding the amounts of their respective withdrawals from the deposit of probable compensation.[5] Significantly, the

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[4] According to MTA's trial brief, "Echemendia was designated as the person most knowledgeable for APMI during deposition regarding the issues presented in this right to take trial. While Mr. Meruelo [APMI's principal] previously testified before this Court that Mr. Echemendia was APMI's Chief Financial Officer, Mr. Echemendia was uncertain as to whether he was an officer of APMI, and identified himself as a consultant."

[5] The stipulation stated: "WHEREAS, Plaintiff, LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY ('MTA'), a public body, has deposited with the Clerk of the above-entitled court a sum of $6,300,000 for the taking of the property located on the northwest corner of the intersection of Alameda Street and 7th Street in the [C]ity of Los Angeles ('Subject Property');

"WHEREAS, Defendant VCC ALAMEDA, LLC (hereinafter 'Trustholder') is the holder of a note and trust deed of the Subject Property which has been designated for condemnation by plaintiff;

"WHEREAS Plaintiff MTA has deposited $6,300,000;

"WHEREAS RPM Investments, Inc. has disclaimed any and all interest in the instant action;

"WHEREAS Jerash, LLC has disclaimed any and all interest in the instant action;

"WHEREAS Bank of America has disclaimed any and all interest in the instant action;

"WHEREAS Alameda Produce Market Inc., a California Corporation, erroneously sued and served herein as Alameda North Parking, Inc. is not objecting to instant withdrawal of funds;

"WHEREAS NAMCO is requesting the sum of $2,140,000.00 be made payable to Driscoll & Fox Client Trust Account on behalf of the Trustholder;

(Fn. continued.)

stipulation stated that APMI "is not objecting to instant withdrawal of funds." On June 10, 2004, the trial court adopted the stipulation in its order authorizing the withdrawals of $2.5 million by California National Bank,[6] $1.5 million by VCC

"WHEREAS the sum of $62,500 shall remain on deposit for the estimated potential tax purposes;

"WHEREAS California National Bank is requesting the sum of $2,554,794.97 as of June 4, 2004 plus $492.17 per day thereafter to be made payable to California National Bank c/o Joshua D. Wayser;

"WHEREAS $7,500 shall remain on deposit for city tax assessments;

"WHEREAS $40,000 shall remain on deposit for potential future city tax assessments;

"WHEREAS Metropolitan Transportation Authority ('MTA') and the City of Los Angeles agree that future tax assessments for the subject property will be paid by MTA, either in installments or as a lump sum;

"WHEREAS the remaining balance of $1,495,205.03, minus $492.17 per day thereafter, shall be made payable to the Driscoll & Fox Client Trust Account on behalf of VCC ALAMEDA, LLC[;]

"WHEREAS, upon full payment, California National Bank, VCC ALAMEDA, LLC, and NAMCO will execute disclaimers in the instant lawsuit;

"IT IS SO STIPULATED AND AGREED between the parties that of the $6,300,000 that is on deposit with the court as the probable just compensation, certain amounts may be withdrawn as follows:

"1. The order shall direct the Clerk of this Court to issue a draft in the amount of $2,140,000.00, made payable to the Driscoll & Fox Client Trust Account on behalf of Defendant NAMCO . . . .

"3. [*Sic.*] The order shall direct the Clerk of this Court to issue a draft in the amount of $2,554,794.97 as of June 4, 2004 plus $492.17 per day thereafter, made payable to California National Bank, c/o Joshua Wayser . . . .

"4. [*Sic.*] The order shall direct the Clerk of this Court to issue a draft in the amount of $1,495,205.03, made payable to the Driscoll & Fox Client Trust Account on behalf of Defendant VCC ALAMEDA, LLC . . . ."

[6] According to its promissory note, California National Bank was: (1) "entitled to all . . . compensation, awards, and other payments or relief" for the "taking of the property," whether or not the security was impaired; (2) assigned "[a]ll such proceeds and rights of action"; and (3) "entitled to commence, appear in and prosecute any action or proceedings or to make any compromise or settlement, in connection with such loss, taking or damage."

Alameda, and $2.1 million by Namco. It is undisputed that the funds were used to pay APMI's loans and that disclaimers of interest were filed by the lenders in this litigation.[7] (§ 1250.325.)

In August 2004, MTA sought to take immediate possession of the property. APMI objected that American Apparel, which had used the property for parking, had not been served with the complaint. In response to this objection, MTA served American Apparel with the complaint as a Doe defendant on August 13, 2004. On September 13, 2004, American Apparel answered the complaint and raised numerous objections to the taking of the property, including MTA's failure to adopt a resolution of necessity that satisfied the requirements of the eminent domain law. (§ 1250.370, subd. (a).)

In October 2004, MTA increased its deposit of probable compensation from $6.3 million ($6.1 million of which had been withdrawn by the lenders) to $8.5 million.

On November 24, 2004, MTA took pretrial possession of the property. After improving the property's pavement, fencing, and drainage, MTA began using the property in June 2005 for additional bus and employee parking as part of its expanded Division I facility.

Between December 2005 and May 2006, the trial court conducted a three-day bench trial on APMI's and American Apparel's objections to MTA's taking of the

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[7] The record contains the following evidence regarding Namco's withdrawal of the deposited funds:

Richard Meruelo was the sole owner of APMI and a company named Merco Group. Before this litigation was filed, Merco gave Namco a $22.2 million promissory note secured by a deed of trust to a property owned by Merco. After Merco defaulted on its note, Merco and APMI offered Namco, as additional collateral for Merco's note, a security interest in APMI's property (the property involved in this litigation), which APMI acquired on March 31, 2004. Namco agreed and recorded an amendment to Merco's note and deed of trust that listed APMI's property as additional collateral. At the same time, Namco also granted APMI a $2.25 million line of credit secured by the property involved in this litigation. On April 1, 2004, MTA filed the present action to acquire APMI's property. Namco, which disbursed $933,000 to APMI under the line of credit, withdrew over $2 million from the deposited funds, which it used to pay off APMI's line of credit and reduce the balance on Merco's note.

property. The trial court also heard, but did not decide, MTA's contention that neither APMI nor American Apparel could challenge the taking in light of APMI's statutory waiver (§ 1255.260) and American Apparel's lack of an enforceable interest in the property.

On July 12, 2006, the trial court entered an order of conditional dismissal. (§ 1260.120, subd. (c)(2).) Without addressing the issues of APMI's statutory waiver and American Apparel's lack of an enforceable interest in the property, the trial court agreed with APMI's and American Apparel's objections that: (1) the resolution of necessity was conditional in that it required MTA "to negotiate further with the appropriate defendants for a plan of 'mutually agreeable parking'"; and (2) in violation of the condition, MTA had failed to engage in meaningful negotiations for mutually agreeable parking, which invalidated the so-called conditional resolution.[8] The trial court concluded that, in light of MTA's failure to fulfill the condition of the resolution, the complaint would be dismissed unless MTA engaged in "fully informed, good faith negotiations . . . as contemplated by the Resolution." The trial court directed the parties to select a mediator to oversee the further negotiations, during which MTA would be allowed to continue using the property.

Between February 2007 and approximately July 2008, MTA and APMI engaged in further negotiations for mutually agreeable parking under the direction of the mediator, retired Court of Appeal Justice John Zebrowski. MTA and APMI discussed several options, including the joint development of a parking structure on the property, which was fenced and paved but had no structures on it.

On August 7, 2008, the mediator issued a report stating that MTA had failed to negotiate in good faith by insisting that the parking structure must include at least 100

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[8] The record is undisputed that MTA ordered its staff to cease negotiating a joint project in January 2006.

ground-floor bus parking spaces, when the property would only accommodate a structure with 87 or 88 bus parking spaces on the ground floor.[9]

On August 25, 2008, MTA filed a supplemental brief that requested rulings on several unresolved issues, including its claim of statutory waiver against APMI. MTA cited a recent appellate opinion, *Mesdaq*, *supra*, 154 Cal.App.4th 1111 (filed on Aug. 31, 2007), which held that the mortgage lender's withdrawal of the deposit of probable compensation to satisfy the owner's indebtedness had resulted in the owner's waiver of all claims and defenses under section 1255.260 except a claim for greater compensation. MTA argued that APMI, whose lenders also had used the withdrawn funds to pay APMI's loans, similarly had waived all claims and defenses except a claim for greater compensation.

On August 26, 2008, the trial court refused to rule on the issue of statutory waiver after striking MTA's supplemental brief as unauthorized. It indicated that it would enter a final order dismissing the complaint and restoring the property to APMI in light of the mediator's finding that MTA had failed to negotiate in good faith. In response to MTA's inquiry whether the order would also require APMI to return the funds withdrawn from the deposit of probable compensation, the trial court stated that MTA would have to pursue other remedies in order to recover the deposit.

On September 5, 2008, MTA filed an ex parte application that again requested a ruling on its statutory waiver claim against APMI under section 1255.260 and *Mesdaq*.

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[9] The report stated that "[t]he LACMTA staff can fairly be described as taking the position that if at least 100 buses could not be parked on the ground floor, then the idea of providing for employee parking for adjacent businesses must be totally abandoned." "[T]he staff never explained why parking for not less than 100 buses on this site was absolutely necessary, . . . the staff never . . . attempted to weigh the importance of the Board's concern for employee parking versus a 'shortfall' of twelve or thirteen bus parking spaces, and . . . the staff flatly refused an invitation to study the proposed plans to determine whether it actually is legally and physically possible to fit 100 buses on the ground floor with parking above."

The trial court again declined to rule, stating that the issue was not properly before the court.

On September 5, 2008, the trial court entered the final order of dismissal that is the subject of this appeal. The September 5, 2008 order stated that because of MTA's failure to negotiate for mutually agreeable parking, the July 12, 2006 order of conditional dismissal would be deemed an order of permanent dismissal. The September 5 order required MTA to relinquish the property to APMI within 90 days, but did not require the return of the deposit.

MTA filed motions for new trial, to set aside the final order of dismissal, and to obtain rulings on its claims of statutory waiver as to APMI and lack of standing as to American Apparel. On November 4, 2008, the trial court denied MTA's motions. As to the statutory waiver claim, the trial court distinguished *Mesdaq* and found that APMI's receipt of the deposited funds did not result in a waiver under section 1255.260 because, unlike the owner in *Mesdaq*, APMI did not consent to the lenders' withdrawals. The trial court did not elaborate on the basis for American Apparel's standing.

On November 25, 2008, MTA timely appealed from the September 5, 2008 order of dismissal and subsequent orders.[10] At some point during this period, APMI filed a

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[10] In its opening brief, MTA describes the September 5 order as "unprecedented" because it "not only let the owner keep its property, it inexplicably authorized the owner also to keep the $6.1 million Metro had deposited with the court clerk when Metro took prejudgment possession of the property. Although the owner's lenders, with the owner's knowledge and assistance, had long ago withdrawn the money and applied the funds to pay off the owner's mortgages on the property, the trial court held that the property owner was entitled [to] 'have its cake and eat it too' by retaining the property and by keeping millions in taxpayer dollars used to make that property debt-free. Moreover, the order divests Metro of property it has been actively using for nearly four years to provide essential bus services to the taxpayers of Los Angeles County, and on which Metro had made substantial improvements."

bankruptcy petition and was succeeded in this litigation by Alameda Produce Market, LLC., which filed the sole respondent's brief on appeal.[11]

DISCUSSION

MTA contends that neither defendant was entitled to challenge the taking of the property in light of (1) APMI's statutory waiver under section 1255.260 and (2) American Apparel's lack of an enforceable interest in the property; and that contrary to the trial court's ruling, (3) the resolution of necessity did not require the negotiation of mutually agreeable parking, and thus the resolution was not invalidated by the failure to negotiate. Alternatively, MTA contends that even if it does not prevail on the first three issues, (4) it was entitled to a conditional dismissal in order to correct any defects in the resolution of necessity, or (5) its surrender of the property should have been made contingent on the repayment of the deposit. Because we agree with the first two contentions, we need not reach the remaining issues.

I. Statutory Waiver

MTA contends, as it did below, that the lenders' withdrawal of the deposited funds to satisfy APMI's loan obligations resulted in a statutory waiver under section 1255.260 of APMI's claims and defenses other than a claim for greater compensation. We agree.

Section 1255.260 provides: "If any portion of the money deposited pursuant to this chapter is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."

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11 The bankruptcy court entered an order lifting the automatic stay as to this litigation on August 28, 2009. (*In re Meruelo Maddux Properties, Inc.* (Bankr. C.D. Cal., No. 1:09-bk-13356-KT).)

A. The Mesdaq Decision

In *Mesdaq*, *supra*, 154 Cal.App.4th 1111, the appellate court considered whether the lender's partial withdrawal of the deposit of probable compensation to satisfy the property owner's loan obligation was sufficient to trigger a statutory waiver of the owner's claims and defenses under section 1255.260. The appellate court found that there was a statutory waiver. It concluded that the owner, having received the benefit of the withdrawn funds through the repayment of his loan obligation, had received the funds within the meaning of section 1255.260, resulting in a waiver of all claims and defenses except a claim for greater compensation.

MTA argues that this case is similar to *Mesdaq* because APMI also received the benefit of the withdrawn funds through the repayment of its loan obligations. MTA contends that the trial court erroneously distinguished *Mesdaq* by reading into the statute a requirement that the owner must explicitly consent to the lender's withdrawal of the deposit in order to effect a waiver.

In *Mesdaq*, the lender had stipulated with Mesdaq, the owner of the subject property who was objecting to the taking, that its share of any recovery in the action would come from the final compensation award. (154 Cal.App.4th at p. 1138.) When Mesdaq fell behind in his loan payments, however, the lender applied to withdraw a portion of the deposit of probable compensation in order to satisfy Mesdaq's loan obligations. Mesdaq informed the trial court that although the lender was prohibited by their stipulation from withdrawing the deposit of probable compensation, he did not oppose the partial withdrawal in order to pay the balance due on his mortgage. (*Id.* at pp. 1138-1139.) Accordingly, the trial court authorized the lender's partial withdrawal, which was applied toward Mesdaq's mortgage. When Mesdaq subsequently appealed from the judgment to challenge the taking of the property, the appellate court dismissed his appeal on the ground that, as a result of the lender's partial withdrawal of the deposit to satisfy Mesdaq's loan obligation, he had received a portion of the deposit and had statutorily waived the right to object to the taking: "We need not reach these contentions because, by statute, Mesdaq has waived his appellate right to challenge the taking of his

property by consenting to the withdrawal of the Agency's deposit of 'probable compensation' by his lender, First National Bank, to pay off Mesdaq's mortgage." (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1118.)

In concluding that a waiver under section 1255.260 may extend from the lender who made the withdrawal to the property owner who received the funds, the appellate court stated: "Construing the statute, it is beyond dispute that a 'portion' of the Agency's deposit for Mesdaq's property was 'withdrawn,' and thus any further challenge to the taking of the property is precluded as to 'the persons receiving such payment.' (§ 1255.260.) Recognizing this, Mesdaq argues only that since FNB [First National Bank] (i.e., not Mesdaq) actually received the deposit, any statutory waiver 'runs only to FNB.' We disagree. [¶] We do not believe there is any legal distinction under section 1255.260 between FNB and Mesdaq with respect to the withdrawal of funds in this case. The money withdrawn was used to satisfy *Mesdaq's indebtedness* to FNB, resulting in a direct increase in the value of Mesdaq's ownership interest in the condemned property, and relieving him of his mortgage obligations and accrual of interest on those obligations. Such a transaction easily constitutes Mesdaq's 'receipt of' the money withdrawn from the deposit. (§ 1255.260.)" (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.)

In support of this conclusion, the appellate court noted that Mesdaq had consented to the lender's withdrawal notwithstanding the stipulation that prohibited the withdrawal: "Further, the payment of Mesdaq's indebtedness with the deposit funds was accomplished with Mesdaq's explicit consent. Mesdaq noted in his pleadings with the court that FNB did not have the legal authority to withdraw the Agency's deposit, but nonetheless informed the court that he (the rightful owner of the deposit) did not object to FNB's withdrawal of the funds for the purpose of satisfying *Mesdaq's* loan obligation. (See § 1255.230, subd. (d) [specifically authorizing parties to object to withdrawal requests].) Accordingly, the trial court, emphasizing Mesdaq's lack of objection, authorized FNB's withdrawal. (See § 1255.220 [requiring court to permit withdrawal if applicant is 'entitled to receive' funds from deposit].) We see no distinction between this scenario—where Mesdaq consented to the withdrawal of the deposit by his bank to pay

off his loan on the property—and a scenario where Mesdaq himself withdrew the deposit and forwarded it to FNB for that purpose. In both situations, Mesdaq has received the funds from the Agency's deposit, and section 1255.260 consequently mandates a waiver of any future objections to the taking." (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.) However, the court noted, "We express no opinion on the question of whether Mesdaq would have waived his right to challenge the taking on appeal if the trial court had permitted FNB to withdraw the deposit over Mesdaq's objection." (*Id.* at p. 1140, fn. 20.)

The court concluded: "In light of the statutory waiver, Mesdaq has waived 'all claims and defenses' with respect to the eminent domain action 'except a claim for greater compensation.' (§ 1255.260.) As it is undisputed that a challenge to an agency's right to take property is not 'a claim for greater compensation,' it necessarily follows that Mesdaq has waived the claims raised in his appeal. (*Ibid.; Mt. San Jacinto* [*Community College Dist. v. Superior Court* (2007)] 40 Cal.4th [648,] 665; *Clayton* [*v. Superior Court* (1998)] 67 Cal.App.4th [28,] 33.)" (*Mesdaq*, *supra*, 154 Cal.App.4th at p. 1140.)

B. Analysis

As previously mentioned, the trial court distinguished *Mesdaq* on the ground that APMI, unlike the property owner in *Mesdaq*, did not explicitly consent to the lenders' withdrawal of the deposited funds. In support of this distinction, APMI argues that MTA's reliance on *Mesdaq* is misplaced because "*Mesdaq* presented a unique fact situation in which the lender entered into a stipulation with the owner, Mesdaq, effectively limiting its right to condemnation proceeds (i.e., payment to the lender could be made only at the conclusion of the case, 'out of the proceeds of the compensation award')."

APMI also contends that because it purposely left over $2 million of the deposit untouched in order to preserve its objections to the taking of the property, the lenders' partial withdrawals of the deposited funds could not have resulted in a waiver of APMI's

claims and defenses under section 1255.260. APMI argues that because its acceptance of benefits was involuntary, there was no statutory waiver. We are not persuaded.

The record does not support APMI's assertion that its acceptance of benefits was involuntary. On the contrary, the evidence was undisputed that APMI had notice of the lenders' applications for withdrawal and that APMI did not object. Moreover, the evidence indicates that in authorizing the lenders' withdrawals, the trial court relied on the lenders' representations, which APMI does not deny, that APMI did not object to the withdrawals. We therefore conclude that under the circumstances, the evidence was sufficient, as a matter of law, to establish that APMI's acceptance of benefits was voluntary.

APMI urges that because *Mesdaq* radically changed the law, its reasoning should not be applied to this case. There is no reason, however, to believe that *Mesdaq* changed the law. *Mesdaq* applied an existing statute to facts that may not have been addressed in earlier published cases, but it did not change the law.

Finally, APMI contends that the notice of the right to object to the applications for withdrawal was deficient. Allegedly, the notice was insufficient because it did not warn that the failure to object to the withdrawal would result in a waiver of the right to object to the taking of the property. However, APMI provides no legal authority to support its assertion that the notice was deficient. As MTA points out, the notice was sent under section 1255.230, subdivision (c), which states that the "notice shall advise such parties that their failure to object will result in waiver of any rights against the plaintiff to the extent of the amount withdrawn." We conclude the notice complied with the statute, and APMI has not shown that anything more was required.

In summary, we conclude there is no valid basis for distinguishing this case from *Mesdaq*. We hold that, as in *Mesdaq*, the lenders' withdrawal and use of the deposited funds to pay APMI's loans was indistinguishable from APMI's receipt of the funds, and therefore resulted in a waiver of APMI's claims and defenses other than a claim for greater compensation.

II. Standing

MTA contends that because the evidence at trial showed that American Apparel had no legal or equitable interest in the property, it is not a proper defendant in this action. (Citing §§ 1250.350 [only a defendant may object to the agency's right to take the subject property]; 1250.230 [a defendant is a person who claims a legal or equitable interest in the property]; § 1235.125 [an interest in property includes any right, title, or estate in property].) We agree.

The evidence at trial showed that American Apparel had occasionally used the property for overflow employee parking, but that it did not have a lease to the property. American Apparel's Dov Charney testified that its employees had parked "illegally" on the property by "trespassing on the property."

APMI contends that because American Apparel was served as a defendant in this action, American Apparel has a right to object to the taking and, therefore, has standing to be heard in this litigation. We disagree with APMI's conclusion. Even though American Apparel was served as a defendant in this case, the evidence at trial showed that it is not a proper defendant because it has no enforceable interest in the property. At best, the evidence supported a finding that American Apparel had a license to use the property for overflow employee parking. A license to use property, however, is not enforceable against third persons (*Qualls v. Lake Berryessa Enterprises, Inc.* (1999) 76 Cal.App.4th 1277, 1285), does not create an interest in property (*Eastman v. Piper* (1924) 68 Cal.App. 554, 560), and does not create a compensable interest in eminent domain proceedings (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196). We therefore conclude that, based on the evidence produced at trial, American Apparel is not a proper defendant in this action.

III. Conclusion

In light of our determination that neither defendant is entitled to object to the taking of the property, the order of dismissal must be reversed in its entirety. MTA is entitled to remain in possession of the property; APMI's successor, Alameda Produce

Market, LLC, may pursue a claim for greater compensation if it wishes to do so; and American Apparel is to be dismissed for lack of standing.

DISPOSITION

The order of dismissal is reversed. The matter is remanded for further proceedings consistent with the views set forth in this opinion. MTA is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P.J.

MANELLA, J.