



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

April 7, 2017

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: C-2016-2570929

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Answer to Motion for Summary Judgement*, in the above captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jennifer Brown-Sweeney".

Jennifer Brown-Sweeney
Assistant Counsel

Enclosure

220/JBS:igl

Cc: Administrative Law Judge David A. Salapa
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Sarah J. Fenton, District Grade Crossing Engineer, District 4-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	C-2016-2570929
	:	Electronically Filed
v.	:	
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

**PENNDOT’S ANSWER TO THE MOTION FOR SUMMARY JUDGMENT AS TO PUC
JURISDICTION OVER APPLICATION FOR DAMAGES SUSTAINED DUE TO
ABOLITION OF RAILROAD CROSSING**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation, by and through its counsel, Jennifer Brown-Sweeney, Assistant Counsel, and in response to the Motion for Summary Judgment of A. Edward Schwartz before the Public Utility Commission respectfully files the within Answer and states as follows:

I. Introduction

The Commonwealth of Pennsylvania Department of Transportation (“PennDOT”) files this Answer to the Motion for Summary Judgment of A. Edward Schwartz (“Schwartz”) before the Public Utility Commission (“Commission”) through its Counsel, Jennifer Brown-Sweeney. For all the reasons that follow, PennDOT submits that its motion for summary judgment be granted and the Complaint of A. Edward Schwartz (“Complaint”) be dismissed.¹

II. Discussion

A. Standards for Granting a Motion for Summary Judgment

The standard for the Commission in granting summary judgment is similar to the standard under the Pennsylvania Rules of Civil Procedure. *United Transp. Union v. Pa. PUC*, 68 A.3d 1026, 1033 (Pa. Cmwlth. 2013). The presiding officer will grant a motion for summary judgment of a party when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *See* 52 Pa. Code § 5.102(d)(1). Additionally, the Commission must view the record in the light most favorable to the non-moving party, giving

¹ PennDOT is not filing an Answer to Norfolk Southern Railway’s Motion for Summary Judgment or Lackawanna County’s Motion for Summary Judgment. This Answer is in response to A. Edward Schultz’s Motion for Summary Judgment only.

that party the benefit of reasonable inferences. *Id.* To preclude summary judgment, the non-moving party must establish that a genuine issue of material fact exists. *Id.*

In deciding a motion for summary judgment under the Pennsylvania Rules for Civil Procedure, the Pennsylvania Supreme Court stated that “[i]t is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. . .” *Samarin v. GAF Corp.*, 571 A.2d 398 (1989).

Schwartz has failed to provide support for his claim that a genuine issue of material fact exists under the record facts and, as such, there is not an issue of fact to be tried. The issue in this case is whether the Commission has jurisdiction over this Complaint for determination of damages sustained due to the abolition of a railroad crossing, without a determination of whether a condemnation has occurred. As this is a matter of law, not fact, PennDOT’s motion for summary judgment should be granted.

B. Schwartz may not add facts to the record for consideration by the Commission by moving to introduce said facts in Schwartz’s Motion for Summary Judgment (“Motion”).

Under the Public Utility Code, a “motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits” on the record. *See* 52 Pa. Code § 5.102(c). Though not specifically identified as such, Schwartz’s Motion contains five separate motions to amend his Complaint². The Motion states, “Schwartz respectfully moves to amend his Application...so as to conform to the Schwartz Affidavit which is attached hereto and incorporated herein by reference...” Schwartz Motion at ¶ 2, ¶ 4, ¶ 6, ¶ 10, ¶ 22. By attempting to amend his Complaint while basing his Motion on the facts contained within said Complaint, Schwartz is in violation of this rule. These aforesaid motions to amend his Complaint include averments of fact not currently in the record and should be denied or in the alternative struck and not considered in ruling on the motion. A motion for summary judgment must be based on facts already in the record.

When considering a motion for summary judgment the court is required to consider the factual averments contained in the relevant pleadings filed to date in the case. Pa.R.C.P. 1035.2. The Superior Court stated, “It is axiomatic that the pleadings which the Rule contemplates be filed of record. This requirement is crystalized in Pa.R.C.P. 1035.3, which mandates that the non-moving party respond to the movant’s motion by identifying, *inter alia*, “one or more issues of fact arising from evidence *in the record* controverting the evidence cited in support of the motion.”” *Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 606 (Pa. Super. Ct. 1997) *citing* Pa.R.C.P. 1035.3(a)(1). Further, the *Scopel* Court stated that even depositions must be properly filed and made a part of the official record before they may be considered as evidence for the purposes of summary judgment. *Scopel* at 604. As discussed above, if Schwartz wanted new facts on the record, the proper procedure would have been for him to amend his Complaint prior to filing his Motion. Since he did not, the new facts introduced in his Motion should not

² The Commission has treated Schwartz’s Application for Determination as to Compensation for Damages Sustained Due to Abolition of Railroad Crossing as a complaint. *See* PUC Letter signed by the Secretary dated October 31, 2016. PennDOT will refer to it as a Complaint throughout.

be considered in ruling on his motion for summary judgment. As such, PennDOT's motion for summary judgment should be granted.

The complainant is free to amend his Complaint pursuant to the Commission's regulations, however it must be done properly. *See* 52 Pa. Code § 5.91(a). In a similar case, the Commission denied complainants' request in their motion for entry of judgment to amend their Complaint as the complainants should "more properly amend their Complaint in a separate pleading, not as part of this Motion." *Commonwealth v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655, "Order Granting In Part and Denying In Part Motion for Entry of Judgment". Therefore, the Commission should strike any facts from the Schwartz Motion, including the Affidavit as it relates to the Motion, rendering those allegations moot when considering PennDOT's motion for summary judgment. Schwartz Motion at ¶ 2, ¶ 4, ¶ 6, ¶ 10, ¶ 22.

Furthermore, as the *Samarin* Court, *supra*, made clear, the purpose of a motion for summary judgment is to decide if there are issues of fact to be tried. *Samarin* at 402. As movant, Schwartz cannot say on the one hand that the Court should find favorably to him and grant his motion because there are no factual issues and on the other hand attempt to modify his complaint to add additional facts for the Commission to base its decision. Therefore, Schwartz's Motion should be denied and PennDOT's motion for summary judgment should be granted.

C. Schwartz's Motion withdraws his *de facto* condemnation claim and requests that a determination for damages be made without an official condemnation, in violation of current law.

There are only two types of takings claims in Pennsylvania: *de facto* and *de jure*. *Cross v. Solebury Twp.*, No. 2011-03528, 2014 Pa. Dist. & Cnty. (Pa. C.P. Bucks Mar. 10, 2014); see *Captline v. County of Allegheny*, 727 A.2d 169, n.7 (Pa. Cmwlth 1999). A *de jure* taking occurs where the taking is initiated by the condemning body in compliance with all statutory requirements. *Captline* at n.7. Therefore, an official condemnation must have occurred in order for a *de jure* condemnation to have taken place. A *de facto* taking occurs where "an entity, clothed with the power of eminent domain, exercises their power and substantially deprives the property owner of all beneficial use of their property." *Conroy-Prugh Glass Co. v. Dep't of Transp.*, 321 A.2d 598, 599-600 (Pa. 1974).

By withdrawing the *de facto* condemnation claim, Schwartz is asserting by implication that a *de jure* taking occurred. Schwartz Motion at ¶ 22. A *de jure* taking requires an official condemnation or appropriation by the Commission. Schwartz did not allege in his Complaint nor in his Motion that an official condemnation or appropriation occurred. Moreover, the record in the underlying matter, C-2011-2237486, is clear that the Commission did not appropriate any property when it ordered the abolition of the crossing. Therefore, a *de jure* taking did not occur.

Further, only where the Commission formally appropriates property, does the Commission have original jurisdiction to determine the award of damages by an aggrieved party. *CSX Transp., Inc. v. Dep't of Transp. of Com. of Pa.*, 641 A.2d 705 (Pa. Cmwlth. 1994). Such compensation may be determined by the Commission itself, where the Commission does appropriate property, or "may, of its own motion, or upon application of any party in interest,

submit to the court of common pleas of the county wherein the property affected is located”. 66 Pa.C.S. § 2704(b). Since the Commission never appropriated property, it lacks subject matter jurisdiction and the case should be submitted to the court of common pleas and PennDOT’s motion for summary judgment should be granted.

Additionally, in order for the Commission to make a determination of damages, a right to compensation must have accrued. The property owner acquires the right to compensation for the property condemned immediately upon appropriation. *Hay v. Commonwealth*, 21 Pa.D.&C.3d 567 (C.P. Somerset 1980) citing *Wayne v. Pa. R. Co.*, 231 Pa. 512, 80 A. 1097 (1911). As discussed above, there was no appropriation of property by the Commission to constitute a *de jure* taking, nor does Schwartz allege an official appropriation of property. Therefore, the property was never condemned and no right to compensation ever accrued. The Commission cannot award damages for a right that has yet to vest. PennDOT’s motion for summary judgment should be granted as there exists only a question of law, whether a condemnation ever took place, and no question of material fact.

D. The Commission does not have jurisdiction to determine damages under the record facts regardless of whether Schwartz alleges a *de facto* or a *de jure* taking.

Under the record facts, the Commission does not have jurisdiction to determine damages despite whether the taking alleged was *de jure* or *de facto*. This fact was acknowledged in the PUC Letter signed by the Secretary dated October 31, 2016, where it stated that “the Commission does not have jurisdiction or the authority to award damages. . . “. PUC Letter signed by the Secretary dated October 31, 2016. Additionally, the Commonwealth Court case of *Hassett v. Dep’t of Transp.* makes clear that “the Eminent Domain Code furnishes the complete and exclusive procedure to govern the assessment of damages for all condemnations of property for public purposes.” *Hassett v. Dep’t of Transp.*, 34 Pa. Cmwlth. 368 (Pa. Cmwlth. Ct. 1978).

If Schwartz were alleging a *de facto* taking, the appropriate course of action would be to file a petition for appointment of a board of viewers pursuant to Section 502(e) of the Eminent Domain Code. 52 Pa.C.S. § 502(e). Section 502(e) provides for the appointment of a board of viewers where a petitioner is claiming to have suffered a compensable injury at the instance of an entity clothed with the power of eminent domain, but no declaration of taking has been filed.³ 26 Pa.C.S. § 502(e); *Goadby v. Philadelphia Elec. Co.*, 639 F.2d 117 (3d Cir. 1981); *Commonwealth v. Shodde*, 512 A.2d 101, 102-103 (Pa. Cmwlth. 1986).

If Schwartz were alleging a *de jure* taking, the Commission’s order would have had to include a “direction to appropriate property”. See *CSX Transp., Inc. v. Dep’t of Transp.*, 641 A.2d 705 (Pa. Cmwlth. 1994). Only then would the Commission have initial jurisdiction to assess damages.⁴ However, since there was no appropriation of property by the Commission or a

³ After the petition for a board of viewers alleging a *de facto* taking is filed, the Court of Common Pleas determines whether a taking occurred prior to any determination of damages. *Dep’t of Transp. v. Smoluk*, 514 A.2d 1000, 1001 (Pa. Cmwlth. Ct. 1986) (stating the process used by the petitioners in a case alleging a *de facto* taking).

⁴ Under a *de jure* taking, the Commission has the authority to either (1) determine the damages itself or (2) refer the case to the trial court for that court to appoint a board of view. 66 Pa.C.S. § 2704; *CSX Transp. v. Dep’t of Transp.*,

declaration of taking filed, and no declaration of taking is even being alleged by Schwartz, the Commission does not have initial jurisdiction to assess damages. *Dep't of Transp. v. Smoluk*, 514 A.2d 1000, 1001 (Pa. Cmwlth. Ct. 1986) citing *Huss v. Dep't of Transp.*, 512 A.2d 1356 (1986). Since there was no appropriation of property by the Commission, the Commission clearly cannot determine damages under the theory of *de jure* taking.

III. Conclusion

Based upon the above, the Commission must deny Schwartz's Motion for Summary Judgment and his attempt to modify his Complaint and the Commission must grant PennDOT's Motion for Summary Judgment. There is no issue of material fact and the question of whether the Commission has jurisdiction is a matter of law, not of fact. Moreover, the Secretary of the Commission has opined that "the Commission does not have jurisdiction or the authority to award damages" in her letter dated October 31, 2016.

IV. Answer

PennDOT specifically avers as follows in response to Schwartz's Motion for Summary Judgment:

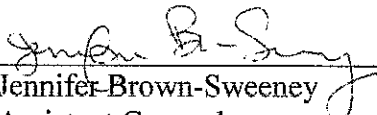
1. – 4. To the extent not previously pled, the allegations contained herein should be struck.
5. This allegation is a conclusion of law, to which no response is required.
6. – 11. To the extent not previously pled, the allegations contained herein should be struck.
- 12 – 21. The allegations are a conclusion of law, to which no response is required.
22. To the extent not previously pled, the allegations contained herein should be struck.

641 A.2d 705 (1994). As a matter of practice, the Commission does not determine damages itself, opting instead to refer cases on damages to the county court of common pleas for an appointment of a board of viewers. *See*, Commission Order dated March 16, 2017, docketed at A-2015-2519862.

WHEREFORE, PennDOT requests that the Commission deny Schwartz's Motion for Summary Judgment and his attempt to modify his Complaint, and grant PennDOT's Motion for Summary Judgment as there is no genuine issue of material fact to be tried.

Respectfully Submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



Jennifer Brown-Sweeney
Assistant Counsel

Gina M. D'Alfonso
Senior Counsel in Charge

Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No. (717) 787-3128
Fax Number (717) 772-2741
Pennsylvania Attorney I.D. Number 314884
jbrownswee@pa.gov

DATED: April 7, 2017

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

A. Edward Schwartz	:	C-2016-2570929
	:	Electronically Filed
v.	:	
	:	
Norfolk Southern Railway Company,	:	
Pennsylvania Department of Transportation,	:	
Lackawanna County and LaPlume	:	
Township	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Answer to the Motion for Summary Judgment** was served upon the parties below by electronic mail, followed by first-class mail, postage prepaid this 7th day of April 2017:

Lawrence M. Ludwig, Esq.
238 Vassar Ave.
Clarks Green, PA 18411
lawludwig@epix.net

Donald J. Frederickson, Jr., Esq.
Lackawanna County General Counsel
200 Adams Ave., 6th Floor
Scranton, PA 18503
kobelfrederickson@yahoo.com

David J. Gromelski, Esq.
148 Adams Ave.
Scranton, PA 18503
djgromelski@wrightreihner.com

Benjamin C. Dunlap, Jr., Esq.
Nauman Smith Shissler & Hall
200 N. Third St., 18th Floor
PO Box 840
Harrisburg, PA 17108-0840
bdunlapjr@nssh.com



Iber Guerrero Lopez, Legal Assistant to
Jennifer Brown-Sweeney
Assistant Counsel
Office of Chief Counsel
P.O. Box 8212
Harrisburg, PA 17105-8212
Telephone No.: 717/787-3128
Fax No.: 717/772-2741

DATED: April 7, 2017