DOCKET NO. FST CV 17-6032293	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT OF
DIAS, JOHN	:	STAMFORD/NORWALK
V.	:	AT STAMFORD
CITY OF NORWALK	:	APRIL 21, 2021

MEMORANDUM OF DECISION

Defendants City of Norwalk (the "City") and the Redevelopment Agency of the City of Norwalk, Connecticut (the "Agency") have moved for summary judgment on the ground that plaintiff John Dias ("Dias") cannot prove his claims for inverse condemnation and unjust enrichment. For the reasons stated below, the motion is granted in part and denied in part.

The Standards for Deciding a Motion for Summary Judgment

"The standards . . . [for] review of a . . . motion for summary judgment are well established. Practice Book [§17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . ." *DiPietro v. Farmington Sports*

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Arena, LLC, 306 Conn. 107, 115-16 (2012), quoting *H.O.R.S.E. of Connecticut, Inc. v. Washington*, 258 Conn. 553, 558-60 (2001). (Citations omitted).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact.... As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent...." *Zielinski v. Kotsoris*, 279 Conn. 312, 318 (2006).

Once the movant for summary judgment has satisfied the initial burden of showing the absence of a material issue of fact, the burden shifts to the opponent to establish that there is a genuine issue of material fact: "it is then 'incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists.'" *Iacurci v. Sax*, 313 Conn. 786, 799 (2014), quoting *Connell v. Colwell*, 214 Conn. 242, 251 (1990). The nonmoving party, however, has no obligation to submit documents establishing the existence of a genuine issue of material fact until the moving party has met its burden of "showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any [such] issue of material fact." *State Farm Fire & Casualty Co. v. Tully*, 322 Conn. 566, 573 (2016).

Summary of Undisputed Facts

The following facts are undisputed:

1. Dias was the owner of a multi-unit building with two store fronts and an apartment at 22-26 Isaac Street in Norwalk (the "Subject Property") from May 10, 1999 to September 2, 2020.
2. On July 14, 2004, the approved redevelopment plan for the area known as the "Wall Street Redevelopment Plan" (the "Plan") was recorded in the city land records.
3. In March, 2006, plaintiff was notified by the Agency the Subject Property was designated for possible acquisition as part of the Plan.
4. On November 14, 2007 The Agency entered into the land distribution agreement ("LDA") with the approved redeveloper for the project site that included the Subject Property, POKO-IWSR Developers, LLC ("POKO"); the LDA was recorded in the city land records which provided record notice of its terms and conditions. Under terms of the LDA POKO would acquire properties within the area if deemed essential for the Plan. The LDA designated the Subject Property as an acquisition property, which constituted record notice the Subject Property was subject to possible acquisition or condemnation as part of the planned redevelopment. The recording of the LDA encumbered the Subject Property because any subsequent owner would be on notice it was subject to the LDA. The Subject Property remained subject to the redevelopment plan until July, 2020, when it was removed from the LDA.

5. In March, 2008, plaintiff was notified by POKO and the Agency that the Subject Property would either be acquired by POKO at a negotiated price or condemned by the City under eminent domain.
6. In 2008 plaintiff and POKO entered into an agreement to purchase the Subject Property for $2,500,000.
7. POKO never performed under the agreement with plaintiff and failed to close and acquire the Subject Property.
8. In 2008 the City transferred two municipal parking lots at Isaacs Street and Leonard Street to the Agency which, in turn, conveyed the lots to POKO. The Issacs Street lot, directly across from the Subject Property, was fenced off by POKO in 2015-16, when it built a building foundation on the site. Construction was halted in 2016 when POKO defaulted under the LDA. The fence and foundation remained without renewed construction activity. The fence marginally encroached on the sidewalk in front of the Subject Property over which plaintiff had an easement.
9. By 2019 the Subject Property was vacant and rundown and was cited as blighted under the City's ordinance.
10. In 2019 and 2020 plaintiff engaged in discussions with third parties to sell the Subject Property on condition that it was removed from the LDA.
11. In July, 2020, the Subject Property was removed from the LDA.
12. On September 2, 2020, plaintiff sold the Subject Property for $1,500,000, but retained the right to pursue the claims in this action.

There are Genuine Issues of Material Fact as to Inverse Condemnation.

State Law of Inverse Condemnation.

After the Subject Property was sold plaintiff amended the complaint to allege a temporary taking under state and federal law. The leading authority on inverse condemnation under Connecticut law is *Barton v. City of Norwalk*, 326 Conn. 139 (2017). In *Barton* the Supreme Court upheld a finding of inverse condemnation of a building when the City of Norwalk took a neighboring parking lot by eminent domain because the owner's use and enjoyment of the property was substantially destroyed. 326 Conn. at 146. The Supreme Court summarized state law on inverse condemnation:

> "'Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.... An inverse condemnation claim accrues when the purpose of government regulation and its economic effect on the property owner render the regulation substantially equivalent to an eminent domain proceeding ....' The government action must result in such a substantial interference with the use of the property that it "amounts to practical confiscation.' ... 'Accordingly, an inverse condemnation action has been aptly described as an eminent domain proceeding initiated by the property owner rather than the condemnor.' ...
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> 'The word taken in article first, § 11 of our state constitution means the exclusion of the owner from his private use and possession, and the assumption of the use and possession for the public purpose by the authority exercising the right of eminent domain.... Although property may be taken without any actual appropriation or physical intrusion ... there is no taking in a constitutional sense unless the property cannot be utilized for any reasonable and proper purpose ... as where the economic utilization of the land is, for all practical purposes, destroyed.... A constitutional taking occurs when there is a substantial interference with private property which destroys or nullifies its value or by which the owner's right to its use or enjoyment is in a substantial degree abridged or destroyed.'... In other words, 'Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property.'" 326 Conn. at 147 (citations and footnote omitted). Accord *Bristol v. Tilcon Minerals, Inc.*, 284 Conn. 55, 83-85 (2007).

The Supreme Court in *Barton* upheld the decision below of Judge Adams that inverse condemnation does not require loss of all economic value to the property; substantial destruction of the owner's use and enjoyment of the property that affects the economic value of the property will suffice:

> "We are not persuaded that the fact that 70 South Main retains some economic value undermines the trial court's conclusion that the plaintiff's use and enjoyment of the property was substantially destroyed. 'Connecticut law on inverse condemnation requires total destruction of a property's economic value or substantial destruction of an owner's ability to use or enjoy the property.'... Logic dictates that where inverse condemnation is found for substantial—but not complete—destruction of an owner's ability to use or enjoy property, the remaining quantum of use or enjoyment will be reflected in some economic value. Where, as here, the plaintiff has shown that his use and enjoyment of property has been substantially destroyed, the taking is of constitutional magnitude and the plaintiff is entitled to just compensation for the inverse condemnation of his property. '[T]he usual measure of damages is the difference between the market value of the [property] before the taking and the market value of [the property] thereafter.'" 326 Conn. at 154-55, quoting *Bristol*, 284 Conn. at 71, 85.

The *Barton* Court cautioned that analyzing whether inverse condemnation has occurred is a very "fact intensive" process for which there is no "bright line" standard:

> "The issue of whether there has been a substantial destruction of an owner's ability to use or enjoy a property—the basis for liability in the present case—is a fact intensive issue. ... '[w]hether a claim that a particular governmental regulation or action taken thereon has deprived a claimant of his property without just compensation is an essentially ad hoc factual inquir[y]' .... There is no bright line standard. We have previously observed that 'it may be difficult to determine in certain close cases whether the alleged infringement on property rights is sufficient to constitute the type of complete taking that inverse condemnation requires ....'" 326 Conn. at 147-148 (citations omitted).

Plaintiff has introduced evidence that steps taken to advance the Plan by defendants and POKO, the designated redeveloper, without acquisition of his interests in the Subject Property, have substantially destroyed his use and enjoyment of the Subject Property and resulted in its inverse condemnation under state law. See generally *Citino v. Redevelopment Agency*, 51

Conn.App. 262, 279-82 (1998).[1] Although they have introduced substantial evidence to the contrary and questioned the credibility of evidence adduced by plaintiff, Defendants have not borne their burden of proof that "it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." *State Farm Fire & Casualty Co.*, 322 Conn. at 573.

Federal Law of Inverse Condemnation.

Federal taking analysis is similar to the state law of inverse condemnation and likewise is fact intensive and requires analysis of the effect of regulation on the economic value of the subject property. See e.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) ("... whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it]... That inquiry may be narrowed to the question of the severity of the impact of the law on appellants' parcel, and its resolution in turn requires a careful assessment of the impact of the regulation on the ... site"). Justice Brennan in *Penn Central* emphasized that "there is no set formula" for an unconstitutional taking and each case must be judged on its facts:

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[1] "We hold that the defendant's actions in failing to implement its redevelopment plan for the area in a reasonable amount of time, although not formally abandoning the plan, and in permitting the overall deterioration of the property within the area, amounts to a taking of the plaintiff's property without just compensation. The plaintiff has pleaded and proved an inverse condemnation for which damages are due." *Citino*, 51 Conn.App. at 281-82. The substantial interference with the owner's property may occur over time. "The precise dimensions of a 'substantial interference' sufficient to amount to a taking in the constitutional sense are not always clear since the concept of substantial interference is not a static one but one that has developed over the years in response to the changing needs of our society." *Textron, Inc. v. Wood*, 167 Conn. 334, 345, 347 (1974). Here, plaintiff's claim is that the cumulative effect of the defendants' alleged acts continued for a substantial period of time and arrested his ability to rent or sell the property and led to the deteriorated state of the Subject Property and reduction of its economic value. The date of "valuation" in plaintiff's interrogatory responses is not dispositive of when the limitations period had run. Defendants have not borne their burden of proving that there is no genuine issue of fact as to whether the claims are barred under the statute of limitations, C.G.S. § 52-577.

"... [I]t will be useful to review the factors that have shaped the jurisprudence of the Fifth Amendment injunction 'nor shall private property be taken for public use, without just compensation.' The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,' ..., this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. ... Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' ...

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. ... So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 123-24 (citations omitted).

Justice Brennan gave an example of a case in which regulation to further important public policies may frustrate an owner's "distinct investment-backed expectations as to amount to a 'taking'":

"*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, id., at 414, 43 S.Ct., at 159, and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land, see id., at 414–415, 43 S.Ct., at 159–160, the Court held that the statute was invalid as effecting a 'taking' without just compensation." 438 U.S. at 127-28.

Plaintiff introduced evidence that his reasonable expectations to rent space at commercially reasonable rates and terms and to sell the Subject Property at fair market value were frustrated by steps taken to advance the Plan by defendants and POKO, the designated redeveloper, without acquisition of his interest in the Subject Property, which have substantially destroyed the value of the Subject Property and resulted in taking the lost value differential in violation of the Fifth Amendment to the United States Constitution.[2] Although they have introduced substantial evidence to the contrary and questioned the credibility of evidence adduced by plaintiff, Defendants have not borne their burden of proof that "it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." *State Farm Fire & Casualty Co.*, 322 Conn. at 573.

Plaintiff Cannot Prove Defendants Were Unjustly Enriched.

The elements of a claim for unjust enrichment were recited by the Appellate Court in *Schirmer v. Souza*, 126 Conn.App. 759, 762-64 (2011).

> "'A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another.... With no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable, it becomes necessary in any case where the benefit of the doctrine is claimed, to examine the circumstances and the conduct of the parties and apply this standard.... Unjust enrichment is, consistent with the principles of equity, a broad and flexible remedy.... Plaintiffs seeking recovery for unjust enrichment must prove

[2] Plaintiff has also introduced evidence and asserted that the encroachment on his sidewalk easement by the fence on the site directly across from the Subject Property developed in advancing the Plan constitutes a "taking" by physical intrusion under the rubric of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), in which Justice Scalia described two types of takings: "[t]he first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." Although defendants minimized the encroachment as a matter of inches and cast doubt on plaintiff's assertions about its effect on his business with contrary evidence, they have not borne their burden this claim must be dismissed as a matter of law.

(1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment....

'This doctrine is based upon the principle that one should not be permitted unjustly to enrich himself at the expense of another but should be required to make restitution of or for property received, retained or appropriated.... The question is: Did [the party liable], to the detriment of someone else, obtain something of value to which [the party liable] was not entitled? ...'" (Citations omitted).

Plaintiff argued that defendants were benefitted by the alleged acts because the LDA was advanced by site control over the Subject Property slated for acquisition, which acted as an encumbrance warehousing it for possible acquisition, and because plaintiff paid property taxes to the City on the Subject Property. Plaintiff also argued that defendants were benefited by the advancement of the Plan to the extent the City received building permit fees and taxes from properties in the LDA now and in the future and received proceeds from the sale of the parking lots.

There is no evidence defendants unjustly received any benefit to which they were not entitled. Simply including the Subject Property in the LDA is not enough. POKO's breach of contract is not attributable to defendants and there is no evidence of any benefit to defendants derived therefrom. Although the contract had it been performed would have advanced redevelopment, simply entered into the contract to advance the Plan is too attenuated a benefit to defendants and there is no evidence POKO's breach of contract advanced the Plan in any way that would afford defendants benefits unjust to plaintiff. The right to compensation for inverse condemnation for economic harm to the owner does not necessarily translate to a corresponding benefit to the city and redevelopment agency

sufficient to sustain unjust enrichment.[3] The Subject Property was taken out of the LDA. Plaintiff did not provide any monetary benefit to defendants directly or indirectly. Receipt of property taxes to the city paid by the plaintiff as owner of the Subject Property or from other owners in the area of the Plan is not a benefit derived from the LDA but is a cost of owning property levied from all commercial property owners as an incident of government. Building permits, taxes and fees paid by others are similarly not attributable to inclusion of the Subject Property in the Plan and also are too attenuated from any alleged injustice to plaintiff. The proceeds from sale of the parking lots did not come from plaintiff or relate to any individual rights he enjoyed and were not unjust as to him. Unjust enrichment is a flexible remedy but plaintiff's arguments to come up with a benefit to defendants unjust to plaintiff stretched equity to its breaking point. The unjust enrichment claim is dismissed.

DECISION ENTERED IN
ACCORDANCE WITH THE
FOREGOING ON 4/21/21.
JD NOTICE SENT 4/21/21.
DCC

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Krumeich, J.T.R

[3] In *Citino v. City of Hartford Redevelopment Agency*, 1997 WL 53318 *15 (Conn.Super. 1997) (Sullivan, J.), Judge Sullivan found that the plaintiff had upgraded the property that he ordered transferred to defendant with mortgages to be paid off by defendant to remedy any unjust enrichment to defendant on transfer of the upgraded building. On appeal the Appellate Court held that it need not decide whether plaintiff had proven unjust enrichment because plaintiff had proven inverse condemnation and concluded that the equitable remedy imposed below for unjust enrichment would also be appropriate damages for inverse compensation. 51 Conn.App. at 263 n.1. "Whether the measure of damages in this unique fact situation is the loss to the plaintiff based on the moneys spent to rehabilitate the property taken and the cost of the land or is the gain to the defendant, which someday might proceed with its plan to redevelop the area, the dollar amount of just compensation would be the same and was correctly established by the trial court." 51 Conn.App. at 284-85. There is no comparable loss to plaintiff or benefit to defendants in this case that unjustly enriched defendants.