Case No. S188128

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY METROPOLITAN TRANSPORATION AUTHORITY Plaintiff and Appellant v. VCC ALAMEDA, LLC., a California limited liability company, et al., Defendants, Respondents and Petitioner.	Court of Appeal Case No. B212643 Los Angeles Superior Court **Case No. BC 313 010**

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

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INTRODUCTION

This is not an isolated case. In California, most properties are subject to a mortgage. For owners wanting to protect their right to take challenge from being waived by their lenders' withdrawal of a portion of the deposit of probable compensation, MTA's suggested solution is that the owners bargain for the preservation of that right in their loan agreements. MTA's opinion is that APMI's loss of its right to take challenge is "a product of its prior decision to prospectively forego that right as part of bargaining of its loan." (Answer, p. 15, fn. 7). But, what property owner would know that it was waiving its future right to challenge a condemnor's right to take the property by agreeing to the standard provision in a loan agreement allowing the lender to receive funds owed to it from the condemnation of the secured property?

The Appellate Court ruled that APMI had voluntarily waived its right to take challenge because it had received notice of the lenders' applications for withdrawal and did not object to the withdrawals. (Opn. at p. 4.) APMI, like most owners of mortgaged properties, had no legal basis to object to the lenders' withdrawal of the deposit and if it had objected, it would have been futile as the trial court had no legal justification to deny the lenders' withdrawal requests. Even MTA acknowledges that its subsequent acquiescence to the lenders' application "was entirely unnecessary because the trial court could have granted the lenders' withdrawal application over MTA's objection." (Answer, p. 20.)

The Supreme Court's guidance is needed on this important question of law -- whether a lender-defendant in exercising its independent right to withdraw a portion of the deposit of probable compensation to satisfy its outstanding lien on the condemned property can waive the owner-defendant's right to challenge the take where the owner has no legal basis to object to the lender's withdrawal?

What constitutes a waiver of an owner's right to take challenge under Code of Civil Procedure Section 1255.260?[1]

A. THE DEPOSIT IS COMPENSATION AND IS SUBJECT TO WITHDRAWAL BY LENDERS WITH A SECURED INTEREST IN THE CONDEMNED PROPERTY

1. There is no legal or contractual basis to delay the lenders' right to receive compensation for their interest in the property to be condemned.

MTA contends that APMI, and presumably other similarly situated owners with mortgaged property, can object to a lender's application for withdrawal of the deposit because a lender is only authorized "to share in the 'compensation awarded'." (Answer, p. 14). It further argues that APMI's deed of trust and the deed of trust in *Redevelopment Agency of the City of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111 precluded the lenders from withdrawing the compensation due them from the deposit. But, APMI's deed of trust provisions differ from those in *Mesdaq*.

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Mesdaq was a unique situation whereby during the condemnation proceeding the lender entered into a stipulation with the owner that if the Agency was successful in taking the property, the lender would "receive payment of the balance of its loan out of the proceeds of the compensation award". (*Mesdaq, supra*, 154 Cal. App. 4th at p. 1138). The deed of trust had similar language limiting the lenders' entitlement to funds from either the award or settlement. (*Id.* at p. 1139, fn. 19.)

AMPI's deed of trust and note do not require the lender to wait for payment of its interest in the secured property until the end of the litigation when the compensation is awarded. The promissory note is broadly worded and provides that the Bank is entitled to "all...compensation, awards and other payments or relief" (Opinion at p. 5 fn.6). The lender also has the right to act independently of the owner and was "entitled to commence, appear in and prosecute any action or proceeding or to make any compromise or settlement."[2] (Opinion, *ibid.*)

MTA admits: "The undisputed facts reveal that with respect to California National Bank the only right APMI surrendered as part of its mortgage contract was its right to object to lenders' "entitlement" to share in compensation, award and other payment of [or] relief." (Answer, p. 18.) MTA narrowly interprets the terms "compensation" and "payment" to only apply to "the compensation award" at the conclusion of the litigation. (Answer, p. 14.) But, the plain meaning of the provision is that APMI surrendered in its mortgage contract the right to object to the lenders'

[2] As stated in APMI's petition, the deed of trust contains similar provisions. (1 JA 0084-0108 at p. 0090).

withdrawal of the deposit, which is both compensation and payment. There is no contractual restriction on when the lender can seek its compensation or other payment or relief which would give APMI the right to object to the lenders' withdrawal from the deposit of probable compensation. In fact, the loan documents provide otherwise, giving the lender the right to appear in the action and make at its discretion any compromise or settlement with the condemnor, which the lender did through its application and ultimate stipulation for withdrawal of the deposit. And as discussed below, there is no statutory restriction on the lenders' right to access the probable compensation on deposit.

An objection by APMI would be in breach of its loan agreement. Moreover, such an objection by the owner to the extent it impaired in any way the lenders' ability to timely receive all monies owed on their note, secured by property that the owner no longer possessed, would be in violation of Civil Code Section 2929.[3] Delaying payments to the lenders of monies rightfully owed them now, until the conclusion of the litigation which in most cases takes years, impairs the lenders' security.

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[3] MTA argues the court cannot rule on this issue as it was raised for the first time in the Petition for Review (Answer, p. 18, fn. 8). The Supreme Court's power of decision extends to any issue presented by the case (California rules of court 8.500(c)(1). Thus, it is at the court's discretion whether to consider the issue of whether the owner would violate Civil Code Section 2929 if it objected to the lenders' right to withdraw its share of the deposit to satisfy its lien.

2. There is no legal distinction between the terms "compensation" and "deposit" for purposes of withdrawals of deposits under Section 1255.010.

There is no question that the lenders could seek the compensation of their loan payment from the deposit of "probable compensation."

Section 1255.210 states that "any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited." The lenders, California National Bank and VCC Alameda, are named defendants in the complaint and NAMCO appeared as a Doe defendant. Section 1255.220, provides: "...the court shall order the amount requested in the application, or such portion of that amount as the applicant is entitled to receive, to be paid to the applicant".

As evidenced by the stipulation for withdrawal between MTA and the lenders, and the court order thereon, the lenders were entitled to receive and be paid from the deposit of probable compensation owed to them based on their secured interests in the condemned property.

MTA draws a distinction between a "pre-judgment deposit" and "compensation" to make its argument that AMPI had the legal right to object to the lenders' withdrawal "of the deposit" because "the deposit is merely a deposit – and not compensation." (Answer, p. 18). No such legal distinction exists between the

deposit and the compensation for the purpose of the lender-defendants' entitlement to the monies owed.

The deposit under Section 1255.010 is ". . . the probable amount of compensation, based on an appraisal that will be awarded in the proceeding." As held in *Pacific Gas & Electric Co. v. Superior Court* (1973) 33 Cal.App.3d 321 at p. 327: "The deposit of funds satisfied the owner's right to just compensation at the time of the taking." Even MTA, elsewhere in its answer, acknowledges that the deposit is compensation: "Although the right to "just compensation" is constitutionally grounded, it is satisfied entirely by making a public agency's deposit available for withdrawal". (Answer, p. 16)

The only constitutional limitations on the right of eminent domain are that the taking be for a public use and that just compensation be paid. (*Mt. San Jacinto Community College District v. Superior Court* (2007) 40 Cal.4th 648,664) The condemnor's ability to acquire pre-judgment possession of the property is permissible under Article 1, Section 19 of the State Constitution because just compensation is paid through the condemnor's deposit of probable compensation.

This court, in *Mt. San Jacinto Community College District* in explaining the history of the quick take procedure, is clear that the funds on deposit are considered compensation. "The 1974 enactment of Article I, Section 19 of the State Constitution authorizes the Legislature to provide for prejudgment possession by the

condemnor upon deposit in court and prompt release to the owner of its probable compensation. (Art. I § 19.)" *Id.* at 648. The *Mt. San Jacinto* decision refers to the following recommendation made by the California Law Revision Commission in its 1956 study on whether condemnation law should be revised to better safeguard private property rights: "The Commission proposed that in quick-take or immediate possession proceedings the owner should have the right to withdraw compensation when the condemnor actually takes possession of the property and therefore have the money available immediately to use when planning for the future." (*Id.* at 658.)

The quick take procedure as codified in Section 1255.010 *et seq.* does not distinguish the rights of the owner from the rights of the lender. MTA agrees, "The deposit money is available for withdrawal by the property owner and others with compensable interests in the property." (Answer, p. 11.) The lenders had the legal right to withdraw the monies owed to them as a result of their mortgaged interest in the property. An objection by AMPI to the lenders' withdrawal would have been futile as there was no legal, contractual or factual basis to object. The owner's right to take challenge is not grounds for legally prohibiting the lenders from seeking withdrawal of the deposit.

MTA relies on this Court's decision in *Mt. San Jacinto, supra* 40 Cal.4th at 666, for its contention that Section 1255.260 effectuates the principle a property owner cannot have its cake and eat it too, that the owner must either deny the condemnor's right to take or take the deposit.

But, *Mt. Jacinto* was not a waiver of the right to take case. There was no withdrawal as the owner, Azusa College, pursued its right to take challenge. The issue presented was whether because of the long delay in bringing the case to trial on compensation the date of value could be the date of trial. The court ruled that because there was a deposit of probable compensation, with safeguards to move to increase of the deposit and the opportunity for withdrawal, the date was fixed. The owner argued that it was precluded from withdrawal because it would have to forfeit its right to take challenge. It was the owner who was put to the election of withdrawal. Here, the withdrawal was the action of third-party defendants who had independent rights to the probable compensation as a result of their secured interest in the property.

As stated in the petition, this is waiver by association – all defendants to the lawsuit are equated without regard to their respective interests and independent rights and standing.

B. THE APPELLATE COURT'S DECISION IS NOT "FULLY CONSISTENT" WITH *MESDAQ* BECAUSE *MESDAQ* DID NOT ADDRESS THE ISSUE OF THE WAIVER APPLYING WHERE THE OWNER HAS NO RIGHT TO OBJECT TO THE LENDER'S WITHDRAWAL

In *Mesdaq*, the withdrawal of the deposit by the lender, First National Bank (FNB), was done with Mesdaq's "explicit consent" and even though he claimed that the lender did not have the right to make the withdrawal. *Redevelopment Agency of*

the City of San Diego v. Mesdaq (2007) 154 Cal. App.4th 1111 at 1140. According to the decision: "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." *Ibid.* The decision explains that the owner and the lender entered into a stipulation that precluded the lender from withdrawing the deposit of probable compensation by providing for payment to the lender only in the event the Agency was successful in taking the property then the mortgaged lender "would receive payment of the balance of its loan out of the proceeds of the compensation award." *Mesdaq, supra* 154 Cal. App. 4th at 1137. The deed of trust had similar language on the lender only being able to "apply the award or settlement to its indebtedness." *Mesdaq, supra* 154 Cal. App. 4th at 1137, fn. 19.

Here, AMPI is not asserting that its lenders have no legal authority to withdraw the Agency's deposit –they do. California National Bank by the express terms of the deed and note and the other lenders pursuant to their right as parties with compensable interests in the property to apply under Section 1255.210 to withdraw that portion of the deposit of probable compensation to satisfy the property's mortgage. MTA admits it had no legal basis to object to the lenders'

application for withdrawal (Appellant's Reply Brief, p. 11).[4] Neither did AMPI. The owner's hands were tied.

Importantly, the court in *Mesdaq* did not decide the issue, here as to whether a voluntary waiver by the owner would be found where the owner had no legal basis to object to the lenders' withdrawal. In *Mesdaq*, the owner had the right to object because the lender had no legal authority to withdraw the deposit, but he instead "explicitly consented." (*Id.* at 1140.) These are not our facts. To the contrary, APMI had no legal basis to object to the withdrawal and therefore any objection made would have been futile and would have provided no basis for the trial court under section 1255.250 to prohibit the lenders' withdrawal of the deposit.

The *Mesdaq* court did not, as argued by MTA, reject entirely the standard of a knowing and intelligent waiver. The court expressly stated it was not rendering an opinion on whether the owner's rights to challenge the take would have been waived if the owner had objected and the court still allowed for the lenders' withdrawal. *Mesdaq, supra* 154 Cal. App.4th at 1140, fn. 20.

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[4] MTA argues in its answer that because the indebtedness documents for VCC Alameda are not a part of the record that there is no support for AMPI's assertion that it lacked the ability to object to these withdrawals. (Answer, p. 18, fn. 9). Even when there are no loan documents, a lender with a secured interest in the property has the constitutional right to be compensated for its interest in the property and the statutory right to withdraw the deposit to the extent of their secured interest in the property. This legal principle is even recognized in partial take cases, "It is well settled in California that in the absence of an agreement between the parties to the contrary a trust deed holder or mortgagee is entitled to share in an award resulting from condemnation of part of the property constituting the security only to the extent the security has been impaired by the taking. (*People, ex rel. Department of Transportation v. Redwood Baseline* (1978) 84 Cal.App.3d 662, 670.)" The beneficiary does not need an entitling clause in the deed of trust to share in the award because a public entity cannot take property subject to a deed of trust without compensating the beneficiary. *Stratford Irrig.Dist. v. Empire Water Co.* (1943) 58 Cal.App.2d 616.

C. "ACCEPTANCE OF THE BENEFITS" RULE IS INAPPROPRIATE IN THIS INSTANCE

MTA and the Court of Appeal contend that APMI accepted the benefit of the lenders' withdrawal orders and therefore APMI has waived its right to challenge the take. Application of the rule of acceptance of the benefits in this instance is incorrect because APMI was not a party to the stipulations for withdrawal which resulted in the orders. Therefore, APMI could not have "accepted the benefits" of the order since the orders did not have anything that APMI could accept or reject.

Both MTA and the Court of Appeal fail to recognize that the rule of voluntary acceptance of benefits of a judgment is subject to qualifications. *Gudelja v. Gudelja* (1953) 41 Cal.2d 202, 214. For the rule to apply the party "must demonstrate a clear and unmistakable acquiescence in, or, to put it another way, an 'unconditional, voluntary, and absolute' acceptance, of the fruits of the judgment." *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 744 [citing *Gudelja, supra*, at p. 214].

A review of the case law indicates that there cannot be a finding of unmistakable acquiescence where the party consistently and continuously objects such as APMI has done in the present case to MTA's right to take the property.

For example, *In re Marriage of Cream,* (1993) 13 Cal.App.4th 81, the wife consistently objected to the trial court's auction procedure and the resulting valuation

of the geyser which the family operated as a business. The wife, by default, ended up with the surviving bid at auction and thus received the geyser. On appeal the husband contended that the wife was precluded from challenging the trial court's decision on the auction and valuation of the geyser since the wife had taken possession to the geyser via the auction detailed in the order. The appellate court found there could be no finding of acceptance of the benefit rule in this instance since the wife's consistent objections to the auction procedure, the resultant valuation of the geyser, and the terms of the judgment preserved the issue for appeal. *Id, p.* 85-86.

Similarly in *Shopoff & Caballo, LLP v. Hyon* (2008) 167 Cal.App.4th 1489 a party did not waive its right to appeal when it accepted distribution of a portion of the proceeds to which it was entitled, but sought a greater share of the award on appeal. Acceptance of the benefit did not result in a waiver because the party had preserved its right by "consistently pursuing his objections to the trial court's rulings." *Id.* p. 1506.

In the present case the evidence is clear that application of the acceptance of the benefit rule is inappropriate as APMI did not demonstrate a clear and unmistakable acquiescence. APMI has consistently objected to MTA's right to take in this condemnation action and has never acquiesced in that regard. APMI's refusal to withdraw the $2,300,000 remaining on deposit for the past five years has been extremely burdensome considering APMI is in bankruptcy. Yet, APMI persists in

pursing it objection. Such objection is all that is required to preclude a finding of waiver by virtue of the acceptance of the benefit rule.

It is true that APMI may have collaterally benefited from the lenders receiving the lenders lien amount. But the lenders, not APMI, were exercising their independent contractual and statutory rights to seek withdrawal of the deposit and those actions cannot result in a waiver to a co-defendant who was not a party to the order. Such collateral benefits resulting from a co-defendant's election to exercise its own rights can hardly be considered unconditional, voluntary and absolute intent on the part of APMI. In other words, the fact that the orders collaterally benefited APMI by reducing its indebtedness does not alter the analysis as collateral effect is not evidence of unequivocal intent to accept the benefits of the order. Without evidence of an unequivocal indication by APMI to accept the benefits of the order there can be no finding of waiver.

D. THE EMINENT DOMAIN LAW PROVIDES A PROCEDURE FOR A CONDEMNOR TO RECOVER ITS DEPOSIT OF THE PROBABLE AMOUNT OF COMPENSATION

There is no credence to MTA's repeated claim that, if the trial court's final order of dismissal had been allowed to stand, it would have had the consequence of MTA being required to return possession of the property to the owner but not requiring the return of MTA's deposit, which would have "resulted in an unconstitutional gift of public funds." (Answer, pp. 3 and 9, fn. 5.) Code of Civil

Procedure Section 1268.160 gives MTA the right to recover the deposited funds. "Any amount withdrawn by a party pursuant to this article in excess of the amount to which he is entitled is finally determined in the eminent domain proceeding shall be paid to the parties entitled thereto. The court shall enter judgment accordingly." If the property was returned to the owner, MTA could have availed itself of the protection of Section 1268.160 and filed a motion for reimbursement. In *Downey v. Johnson* (1978) 79 Cal.App.3d 970, it was held that the trial court properly granted the City's motion for reimbursement to recover from the owner the amount withdrawn by him as to the first judgment, which was in excess of the final award. And, in *Los Angeles Unified School District of Los Angeles County v. Wilshire Center Marketplace* (2001) 89 Cal.App.4th 1413, 1418 when a school district filed a notice of abandonment of an eminent domain action after the owner had withdrawn the school district's deposit of the probable amount of compensation, the court in finding that a voluntary abandonment is the equivalent of dismissal held that when the condemnation action is abandoned the plaintiff is entitled to recover the amount it deposited as the probable amount of compensation.

Moreover, prior to the lender's withdrawals, MTA could have taken advantage of the protection provided in Section 1255.240 and requested that the trial court require the lender applicants to first file an undertaking to secure payment to MTA of any amount withdrawn that exceeds amounts to which the lender applicant would be entitled as finally determined in the proceeding.

E. THE COURT OF APPEAL'S INTERPRETATION OF WAIVER BY ASSOCIATION IS NOT UNIFORM WITH THE *ATTISHA* DECISION

The Appellate Court's ruling in *Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357 recognized defendants' competing interests in a condemnation case and held that one defendant's action did not bind or result in the waiver of another defendant's claim. While *Attisha* did not involve the owner's waiver of right to take challenge, it certainly provides authority on the issue of waiver. And, waiver is the crux of the present case. The essential point of the *Attisha* decision is that a defendant-owner's stipulation with plaintiff as to the highest and best use of the property did not in any way bind a defendant-tenant seeking loss of goodwill based on a use different than the stipulated highest and best use. Simply put, where there are distinct party defendants in a condemnation case, the action of one does not bind the other.

CONCLUSION

The owner's right to challenge the condemnor's take should not be waived by a lender who rightfully seeks to withdraw its share of probable compensation on deposit to which it is legally entitled.

The Supreme Court needs to settle the conflict in condemnation law as to the appropriate standard for waiver under Section 1255.260 as between the competing claims and interests of the owner and the lender.

Respectfully submitted,
MATTEONI, O'LAUGHLIN & HECHTMAN

Date: Dec 15 2010

Peggy M. O'Laughlin

CRC RULE 14(c) CERTIFICATE

I, PEGGY M. O'LAUGHLIN, hereby certify, in reliance on the word count of the computer program used to prepare this **REPLY TO ANSWER TO PETITION FOR REVIEW OF A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 4**, that said reply contains **3,933 words**.

Date: December 14, 2010

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, Jesse Munoz, 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 December 15, 2010, I served the within:

1. **REPLY TO ANSWER TO 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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Jesse Munoz

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AGENCY
Plaintiff and Appellant

v.

VCC ALAMEDA, LLC
Defendant, Respondent and Petitioner

Court of Appeal Case No. B212643

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