Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-013072
(Consol.)

05/11/2007

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
S. Yoder
Deputy

ARIZONA STATE, et al.

BRYAN B PERRY

v.

LESUEUR INVESTMENTS V, L L C, et al.

JAMES T BRASELTON

JOHN W PAULSEN

RULING

This matter was taken under advisement after the May 2, 2007 oral argument on Plaintiff's Motion to Reconsider Admissibility of State's Pre-Condemnation Offer. The Court has considered Plaintiff's Motion to Reconsider Admissibility of State's Pre-Condemnation Offer, Defendant Lesueur's Response to Plaintiff State of Arizona's Motion to Reconsider Admissibility of State's Pre-Condemnation Offer, Defendant Lesueur's Supplemental Response to Plaintiff's Motion to Reconsider Admissibility of State's Pre-Condemnation Offer, and the arguments of counsel.

On March 2, 2007, the Court granted Defendant's Motion for Alternative Form of Relief and ordered that Defendant would be allowed to introduce as evidence at trial the State's initial offer (hereinafter "the 7098 offer"). In deciding to allow the admission of the 7098 offer, the Court found *Department of Transportation v. Frankenlust Lutheran Congregation, et al.*, 711 N.W. 2d 453 (Ct. App. MI 2006) to be persuasive.

In its Motion for Reconsideration, the State, relying on *State ex rel. Miller v. Superior Court*, 189 Ariz. 228, 941 P.2d, 240 (App.1997), argues that A.R.S. § 12-1116(O) and Rule 408 prohibit the admission of the 7098 offer. In *Miller*, the trial court ruled that the ADOT appraisal

and portions of a stipulated agreement were admissible as admissions against interest on the issue of value. The Court of Appeals found that the ADOT appraisal was prepared:

> …either: (1) for the purposes of negotiating a stipulation between ADOT and the property owners to receive immediate possession without court intervention; or (2) to provide a court with evidence to determine probable damages after application for immediate possession under A.R.S. § 12-1116(J). 189 Ariz. at 232.

The Court found that Rule 408 precludes the evidence in the former situation and § 12-1116(J) precludes the evidence in the latter.

Unlike in *Miller*, in this case the evidence in question is the 7098 offer, not a stipulation nor an appraisal introduced pursuant to A.R.S. § 12-1116(O). Unlike in *Miller*, in this case the court has no evidence before it (other than argument) that the 7098 appraisal which supported the 7098 offer (**see** 28-7098(A)(2)) was really prepared for a § 12-1116(O) stipulation or probable damages. Unlike in *Miller* where the evidence of the stipulation and appraisal was offered by the property owner as an admission by the State to prove value, here the 7098 offer is offered by the defendant, not to prove value nor as a judicial or evidentiary admission, but to impeach or discredit the State's claim as to value of the property.

Although, as discussed below, the Court does not find that the 7098 offer was a Rule 408 offer to compromise, if it were, it is admissible for impeachment. "The public policy underlying both the Arizona and the federal rules of evidence favors allowing courts to admit evidence presented during compromise negotiations for impeachment." *Hernandez v. State*, 203 Ariz. 196, 199, 52 P.3d 765 (2002).

The Court finds that the State's 7098 offer is not an offer to compromise a claim under Rule 408. Pursuant to the procedures outlined in A.R.S. § 28-7098, a complaint for condemnation cannot be filed and the taking cannot occur before the offer constituting the State's "estimate of just compensation" is made. Until a complaint for condemnation is filed, there is "no claim" to be compromised under Rule 408. *Department of Transportation v. Frankenlust*, *supra*, at 460.[1]

Allowing the admission of the State's 7098 offer does not undermine the purpose of Rule 408. The purpose of Rule 408 is to facilitate settlements by encouraging "free communication

[1] In *Hernandez v. State*, 201 Ariz. 336, 35 P.3d 97 (App. 2001) the Court of Appeals found that a claim made pursuant to A.R.S. § 12-821.01(A) did not amount to an offer to compromise pursuant to Rule 408. On review, in *Hernandez v. State*, 203 Ariz. 196, 52 P.3d 765 (2002) the Supreme Court declined to address the issue of whether Rule 408 applies to a notice of claim filed under Section 12-821.01.

between parties." Advisory Committee Notes to Fed. R. Evid. 408. The State is required to make an offer which "must constitute the Department's estimate of just compensation." Under the statutory scheme, there is no room for the State's 7098 offer to be a "compromise." The State cannot offer anything in its 7098 offer more or less than what it determines to be "just compensation." The mandatory offer of just compensation is a statement of "the amount which the government believes the land owner is constitutionally entitled to should negotiations fail and condemnation proceedings be initiated. As such, the policy reasons for excluding offers of compromise…are not applicable to these statements." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 824-825 (C.A. 5, 1979). Admission of the 7098 offer will not discourage the State from making offers in the future. The 7098 offer is mandated by law. Nor will it encourage "lowball" offers. The 7098 offer must be the Department's "estimate of just compensation."

IT IS ORDERED denying Plaintiff's Motion for Reconsideration.

IT IS FURTHER ORDERED that evidence of the State's 28-7098 offer is admissible for purposes of impeaching the State's position at trial regarding its evaluation of just compensation. The State is allowed to present evidence to explain inconsistencies that exist between its 7098 offer and its position at trial.