

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30295
H/prt

_____AD3d_____

Argued - January 31, 2011

JOSEPH COVELLO, J.P.
CHERYL E. CHAMBERS
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2009-10419

DECISION & ORDER

In the Matter of Peter Sherman, et al., appellants, v
Planning Board of Village of Scarsdale, et al.,
respondents.

(Index No. 14255/09)

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, N.Y.
(Michael J. Schwarz and Eric J. Mandell of counsel), for appellants.

Wayne D. Esannason, Village Attorney, Scarsdale, N.Y. (Richard M. Gardella of
counsel), for respondents Planning Board of the Village of Scarsdale and Nunzio
Pietrosanti.

Cuddy & Feder, LLP, White Plains, N.Y. (Joshua J. Grauer, Andrew P. Schriever,
and Anthony P. Luisi of counsel), for respondents Moshe Gelboim and Ellen Gelboim.

In a proceeding pursuant to CPLR article 78 to review (1) a determination of the Building Inspector of the Village of Scarsdale set forth in a letter dated June 27, 2008, which found that one of the lots of a two-lot subdivision proposed by Moshe Gelboim and Ellen Gelboim would be considered to be in the Village of Scarsdale's A-3 Zoning District upon the proper filing and approval of a new subdivision plat, and (2) a determination of the Planning Board of the Village of Scarsdale dated May 27, 2009, conditionally granting an application for a proposed two-lot subdivision of the property located at 51 Sycamore Road in the Village of Scarsdale, and issuing a negative declaration under the State Environmental Quality Review Act (ECL art 8), the petitioners appeal from an order and judgment (one paper) of the Supreme Court, Westchester County (Loehr, J.), dated October 13, 2009, which, in effect, granted the separate motions of the respondents

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Planning Board of the Village of Scarsdale and Nunzio Pietrosanti and the respondents Moshe Gelboim and Ellen Gelboim to dismiss the petition pursuant to CPLR 3211(a)(7) and (10) and 7804(f) insofar as asserted against them, and, in effect, denied the petition and dismissed the proceeding.

ORDERED that the appeal is dismissed, with one bill of costs.

The appellants commenced this CPLR article 78 proceeding to review, among other things, a determination of the Planning Board of the Village of Scarsdale that conditionally granted the application of their neighbors, Moshe Gelboim and Ellen Gelboim (hereinafter together the Gelboims), for approval of a plan to subdivide their property into two lots. The Supreme Court, inter alia, in effect, denied the petition and dismissed the proceeding.

It is undisputed that during the pendency of this appeal, the Gelboims obtained approval and filing of the final plat for their subdivision by, among other things, effecting the demolition of the existing house and pool on the subject property, at significant personal expense. The appellants failed to move in the Supreme Court for a preliminary injunction to enjoin the Gelboims from undertaking the steps needed to obtain final plat approval. In addition, the appellants failed to move in this Court for a preliminary injunction to preserve the status quo pending the determination of this appeal. Consequently, the appellants failed to preserve their rights pending appellate review, and the appeal must be dismissed as academic (*see Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165; *Matter of Dowd v Planning Bd. of Vil. of Millbrook*, 54 AD3d 339, 340; *Matter of Hudson Val. Nursery v Planning Bd. of Town of Orangetown*, 306 AD2d 283; *Matter of Padavan v City of New York*, 291 AD2d 561). Under the instant circumstances, the Gelboims would suffer substantial prejudice if the petitioners prevailed (*see Matter of Hudson Val. Nursery v Planning Bd. of Town of Orangetown*, 306 AD2d 283; *Matter of Imperial Improvements v Town of Wappinger Zoning Bd. of Appeals*, 290 AD2d 507).

COVELLO, J.P., CHAMBERS, LOTT and COHEN, JJ., concur.

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DECISION & ORDER ON MOTION

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Motion by the respondents Moshe Gelboim and Ellen Gelboim to dismiss the appeal from an order and judgment (one paper) of the Supreme Court, Westchester County, dated October 13, 2009, on the ground that it has been rendered academic, or on the ground of laches. By decision and order on motion dated July 23, 2010, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for a determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is denied as academic in light of the dismissal of the appeal (*see Matter of Sherman v Planning Bd. of Vil. of Scarsdale*, _____AD3d_____, [decided herewith]).

COVELLO, J.P., CHAMBERS, LOTT and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court