

Star Prop. Holdings, LLC v Town of Islip Planning Bd.

2016 NY Slip Op 31944(U)

July 8, 2016

Supreme Court, Suffolk County

Docket Number: 01911-2016

Judge: William G. Ford

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO.: 01911-2016

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY**

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Date: 3/9/16

Adjourn Date: 4/21/16

Motion Seq #: 001 MD

002 MG

003 MD

004 MG CASE DISP

STAR PROPERTY HOLDINGS, LLC,
PREMIUM ENERGY, INC. and TWO
BROTHERS DELICATESSAN & CATERER'S,
INC.,

Petitioners/Plaintiffs

-against-

THE TOWN OF ISLIP PLANNING BOARD,
TOWN OF ISLIP DEPARTMENT OF
PLANNING AND DEVELOPMENT,
BUILDING DIVISION OF THE TOWN OF
ISLIP DEPARTMENT OF PLANNING AND
DEVLOPMENT, KENNETH WEEKS as
DIRECTOR OF THE BUILDING DIVISION
OF THE TOWN OF ISLIP DEPARTMENT OF
PLANNING AND DEVELOPMENT, QUICK
CHEK CORPORATION and TD BANK, N.A.,

Respondents/Defendants.

PETITIONER'S ATTORNEY:

AVRUTINE & ASSOCIATES, PLLC
575 Underhill Boulevard, Suite 140
Syosset, NY 11791

RESPONDENT'S ATTORNEY:

ISLIP TOWN ATTORNEY
Mea E. Knapp, Esq.
655 Main Street
Islip, NY 11751

TD Bank, N.A.
MORRIT, HOCK & HAMROFF
400 Garden City Plaza, Suite 202
Garden City, NY 11530

In consideration of the following papers on the pending application before the Court:

1. Order to Show Cause and supporting papers for an Order pursuant to CPLR Article 63 for a preliminary injunction;
2. Order to Show Cause, Notice of Petition and Verified Petition and supporting papers seeking an Order pursuant to CPLR Article 78;
3. Cross-Notice of Motion and supporting papers seeking an Order pursuant to CPLR 3211 to dismiss;
4. Reply papers in further support and after hearing from counsel representing the parties at oral argument, it is

ORDERED the pending applications are decided as thusly discussed below; the Petitioners' motion for injunction and Article 78 relief are **DENIED**; Respondents' motions are **GRANTED**; and it is further

ORDERED that the motion by the respondent for an order pursuant to CPLR 406 and 3211(a)(5) and (a)(7) dismissing the petition is **GRANTED** to the extent provided below.

BACKGROUND

This matter is before the Court on petitioner's motion seeking the issuance of a preliminary injunction to enjoin respondents from acting in furtherance of issuing building permits on special use permits and change of zone concerning a certain property located in the Town of Islip and additionally seeking a final order pursuant to Article 78 vacating and annulling those prior municipal determinations.

This dispute concerns property located at the south side of Motor Parkway at 648 Motor Parkway in Brentwood, Town of Islip, New York, currently owned by respondent TD Bank, N.A. Petitioner Star Property Holding, LLC ("Star") is the owner of real property located at 62 Motor Parkway. Petitioner Premium Energy, Inc. ("Premium") is the owner and operator of a Shell gasoline service station and convenience store on the property owned by Star. Petitioner Two Brothers Delicatessen and Caterers, Inc. ("Two Brothers") owns and operates a delicatessen and catering business located at 642 Motor Parkway, abutting the property in question.

Respondent Quick Chek is a contract vendee who proposes to remove a preexisting 10,000 square foot building and redevelop the site with a 6,900 square foot convenience and gasoline service station. Quick Chek originally filed an application with Islip's Planning Board on October 25, 2013 recommending a change of zone from Business 1 to Business 3, and for special use permits to allow for the construction of a convenience store and gasoline station. It further sought special permits to allow for a convenience store and minor restaurant.

The Planning Board held a public hearing on the application on November 20, 2013. At that meeting, Star and Premium appeared through representatives to oppose the application raising business competition and traffic concerns. The Board also considered submissions from respondent's experts, including a traffic study in addition to the Town's separate traffic study prepared by an outside consultant.

On August 7, 2014, the Planning Board via resolution issued a recommendation to the Town Board approving of the proposed zone change and special use permits allowing for the convenience store and gasoline station, determining that they complied with SEQRA. The Board further approved of the special use permits for the convenience store and minor restaurant subject to covenants and restrictions, informed respondent's counsel of this fact.

The Town Board convened a public hearing on the application on September 25, 2014. At that hearing, the Board heard testimony by witness on Quick Chek's behalf in support of the application, including a real estate representative, project engineer, traffic safety expert, and legal counsel. The Islip Town Planning Commissioner testified that the site was appropriate for the proposed use, safe and was a significant improvement to the subject area. He also noted that the short environmental form had been completed and no adverse environmental impacts were anticipated. His testimony concluded with a recommendation towards grant of the application. The Board was given an opportunity to inquire on the application. Petitioner's counsel gave testimony in opposition to the application and the meeting's record was held open to allow him

to submit further written opposition. Further two representatives from the respondents testified in opposition to the application on the record. After the meeting, the Town Board approved the application and adopted a negative declaration under SEQRA.

Petitioners have also commenced this special proceeding by Order to Show Cause and Verified Petition for a judgment under article 78 seeking, *inter alia*, a judgment annulling and vacating a February 11, 2016 determination of the Town of Islip Planning Board and Town Board (“Islip respondents”) granting respondent Quick Check Corporation (“Quick Chek”) for a change of zone from Business 1 District to Business 3 District, and which also granted a special permit for gasoline service station on a premises located at 648 Motor Parkway, Brentwood, New York. Petitioners also seek an order annulling and vacating the January, 2016 Town of Islip Planning Board Resolution granting Quick Chek’s application for a special permit authorizing a convenience store and a minor restaurant on the premises located at 648 Motor Parkway, Brentwood, New York. Lastly, petitioner sought a final and permanent injunction preventing the issuance by the Town respondents of any building and demolition permits on the resolutions cited above.

As a threshold matter, the Court notes that this matter has been previously before Supreme Court, in a substantially similar article 78 challenge under index number 20884-2014. The Court assumes the parties’ familiarity with the salient facts and circumstances in that proceeding and only cites to the material differences as appear in this matter *sub judice*. That matter was resolved in December 2015 in a thorough and well-reasoned memorandum and decision of the Hon. Andrew G. Tarantino, Jr. disposing of the petition, granting it in part and denying it in part. Specifically, that Court granted petitioners and declaratory judgment insofar as finding that the Town of Islip respondents’ September 2014 determination on the Quick Chek’s application for was invalid for its failure to comply with the New York State Environmental Quality Review Act.

In that proceeding petitioners sought a judgment and order vacating and annulling a determination of the Islip Town Board concerning the change in zone and granting of a special permit to allow for the gasoline service station, vacating and annulling the Planning Board resolution authorizing the construction of the convenience store and minor restaurant, and lastly enjoining the Planning and Development Department from issuing building permits for the project as a whole.

Since that court is a coordinate court and jurisdiction, and while not explicitly bound by that decision, this Court will follow the reasoning of that prior, unappealed determination (*Ayala v Fortaleza*, 40 AD3d 440, 441, 836 NYS2D 584[1st Dept. 2007][“it is axiomatic that one judge may not review or overrule an order of another judge of co-ordinate jurisdiction in the same action or proceeding”).

Since then, Quick Chek has taken steps to remediate or cure the deficiencies previously cited in Justice Tarantino’s decision, specifically by submitting to the Suffolk County Planning Commission for consideration General Municipal Law § 239-1 & m, which the County determined to be a project of local concern on February 3, 2016. Accordingly, Quick Chek

Star Property Holdings, Inc. v. The Town of Islip

Star Property Holdings, Inc. v. The Town of Islip

Index Number: 01911/16

Page 4

submitted a new application to the Islip Planning Board seeking special permits for the convenience store and minor restaurant, in addition to the Islip Planning Board seeking special permits for the convenience store and minor restaurant, in addition to parking and landscaping relations at the subject premises. On February 11, 2016, the Board held a public hearing on the application and concluded with approval of the application.

Petitioner's points of contention supporting annulment of the Board's determination are that the Board did not identify areas of environmental concern and failed to take a "hard look" at potential environmental impacts;

DISCUSSION

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 917 NYS2d 680 [2d Dept. 2011]; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]). "A preliminary injunction is a drastic remedy that should not be granted unless a clear legal right thereto is shown" (*McGuinn v City of New York*, 219 AD2d 489, 645 NYS2d 770, 771 [1st Dept. 1995]).

Generally, local zoning boards have broad discretion in deciding applications (*See Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2NY3d 608, 613, 781 NYS2d 234, 814 NE2d 404; *Matter of Goldberg v Zoning Board of Appeals of City of Long Beach*, 79 AD3d 874, 876, 912 NYS2d 668). "Courts may set aside a zoning board determination only where the record reveals that the board acted illegally or arbitrarily, or abused its discretion, or that it merely succumbed to generalized community pressure" (*Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d at 613, 781 NYS2d 234, 814 NE2d 404). "[A] determination will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition, and lacks an objective factual basis" (*Matter of Cacsire v City of White Plains Zoning Board of Appeals*, 87 AD3d 1135, 1137, 930 NYS2d 54). "Conclusory findings of fact are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth how and in what manner the granting of the variance would be improper" (*Matter of Gabrielle Realty Corp. V Board of Zoning Appeals of Village of Freeport*, 24 Ad3d 550, 550, 808 NYS2d [internal quotation marks omitted]). *Luburic v Zoning Board of Appeals of Village of Irvington*, 106 AD3d 824, 825, 966 NYS2d 440, 441-42 [2d Dept. 2013].

CPLR 6301 provides as relevant here, in part that:

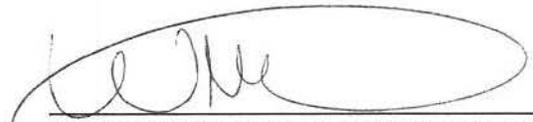
A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an action in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

Star Property Holdings, Inc. v. The Town of Islip
Index Number: 01911/16
Page 5

Thus, in accord with prevailing precedent, petitioner's attempt to end run the statute of limitations is **DENIED** and respondent's motion to dismiss on the grounds of the statute of limitations is **GRANTED**. Accordingly, the Article 78 Petition is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 8, 2016
Riverhead, New York



HON. WILLIAM G. FORD, J.S.C.

 X FINAL DISPOSITION

 NON-FINAL DISPOSITION