

**Matter of Oyster Bay Associated Limited Partnership
v Town Board of Town of Oyster Bay**

2003 NY Slip Op 30034(U)

November 25, 2003

Supreme Court, Suffolk County

Docket Number: 0016830/6830

Judge: James M. Catterson

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SHORT FORM ORDER

INDEX NO. 16830/01

SUPREME COURT - STATE OF NEW YORK
IAS PART XXXVIII SUFFOLK COUNTY

PRESENT:

Honorable JAMES M. CATTERSON

R/D 08-25-03

MOTION NO. 003 MG CASEDISP

In The Matter of the Application of
OYSTER BAY ASSOCIATED LIMITED PARTNERSHIP
and WPIX, MC.,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

-against-

THE TOWN BOARD OF THE TOWN OF OYSTER BAY
and THE TOWN OF OYSTER BAY ENVIRONMENTAL
QUALITY REVIEW COMMISSION,

Respondents.

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Birchwood Park at Syosset Homeowners
Association, and Warren Church, as
President of Syosset Groves Civic Assoc.
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Upon reading and filing the following papers in this matter: (1) Notice of Petition dated July 16, 2003 and supporting papers (including Memorandum of Law in Support of Petitioners' Motion for Entry of Judgment) by petitioner; (2) Affirmation in Opposition to Petitioners' Motion Seeking to Modify or Vacate the Court's Order of July 8, 2002 dated August 6, 2003 and supporting papers (including Memorandum of Law of Intervenors-Respondents' in Opposition to Motion to Modify Order) by intervenors-respondents; (3) Town of Oyster Bay's Memorandum of Law on Remand Issue dated August 6, 2003 by respondents; (4) Reply Affirmation dated August 22, 2003 and supporting papers by petitioners; (5) Letter of September 19, 2003 by attorney for respondents; (6) Letter of September 19, 2003 by attorney for intervenors-respondents; (7) Letter of October 3, 2003 by attorney for petitioners; and now,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing and of the oral argument held in this Court October 15, 2003, the motion is decided as follows:

ORDERED that the Court's Decision and Order of July 8, 2002 is hereby modified to the extent that this matter is remitted to the respondents for the issuance of a building permit for the construction of the proposed 860,000 square foot shopping mall. It is further

ORDERED that the petitioners are directed to serve a copy of this Decision and Order upon all parties.

Petitioners Oyster Bay Associates limited Partnership and WPIX, Inc. (hereinafter collectively referred to as the “Petitioners”) move pursuant to C.P.L.R. 7806 for entry of judgment directing the respondents the Town Board of the Town of Oyster Bay and the Town of Oyster Bay Environmental Quality Review Commission (hereinafter collectively referred to as the “Town”) to issue a permit for the construction of an 860,000 square foot shopping mall on the site of the former Cirro Wire Manufacturing facility based upon the Appellate Division, Second Department’s holding in this case.’

In what appears to be a case of first impression, the Court is faced with the question of the effect of an appellate affirmance on an underlying remittal in an Article 78 proceeding. The Petitioners argue that the language of the Second Department’s decision requires at the least a modification of the original remittal, and at the most the entry of judgment pursuant to C.P.L.R. § 7806. The respondents contend that any such modification or judgment would constitute a prohibited amendment of a final judgment post appellate review.

There are two contrary sentiments that serve to illustrate the present controversy. It is beyond cavil that brevity has its virtues in many instances. “Let thy speech be short, comprehending much in a few words.” Ecclesiasticus 32:8. However, the scientist, philosopher and Catholic apologist Blaise Pascal commented on the difficulty of crafting concise writing: “I made this letter longer than usual because I lack the time to make it short.” It is the Second Department’s use of only fifty words that now frames the question of whether this Court has the power to alter the terms of its original remittal in a C.P.L.R. Article 78 proceeding after that remittal was affirmed on appeal.

In the July 8, 2002 Decision and Order, the Court detailed how the Town’s fifteen separate findings were largely arbitrary, capricious and not supported by substantial evidence of record. The Court also found that the Town failed to consider the proposal to reduce the project’s size from 860,000 square feet to 750,000 square feet. In affirming that Decision and Order, the Second Department held that,

Contrary to the appellants’ contention, the Supreme Court properly determined that the denial by the Town Board of the Town of Oyster Bay (hereinafter the Town Board) of the petitioners’ application for a special use permit was arbitrary and capricious. There was insufficient evidence to support a deviation from the

¹On July 8, 2002 this Court issued a Decision and Order remitting the underlying action to the Town for proceedings consistent with the decision. Matter of Oyster Bay Associates Ltd. Partnership et al. v. The Town Board of the Town of Oyster Bay, et al., July 16, 2002 N.Y.L.J. 26 col. 5. Familiarity with that Decision and Order and the preceding administrative actions of the Town that gave rise to the litigation is assumed. By Decision and Order of February 7, 2003, the Second Department affirmed the July 8, 2002 Decision and Order. Matter of Oyster Bay Associates Ltd. Partnership et al. v. Town Board of Town of Oyster Bay, et al., 303 A.D.2d 410, 755 N.Y.S.2d 671 (2d Dept. 2003). The Court of Appeals dismissed the motion for leave to appeal on September 16, 2003. Matter of Oyster Bay Associates Ltd. Partnership et al. v. Town Board of Town of Oyster Bay, et al., 100 N.Y.S.2d 606, 766 N.Y.S.2d 160, 798 N.E.2d 345 (2003).

initial SEQRA finding of the Town Environmental Quality Review Commission, which was in favor of the proposed project (*see Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd*, 79 NY2d 373,384; *Matter of SCI Funeral Sews. of N.Y. v Planning Bd. of Babylon*, 277 AD2d 319,320; *Matter of Ernalex Constr. Realty Corp. v Bellissimo*, 256 AD2d 338,340). Further, the Supreme Court properly determined that the Town Board abused its discretion in failing to consider the petitioners' offer of mitigation (*see Matter of Merson v McNally*, 90 NY2d 742,753-754; *cf. Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400,429-430).

The second sentence of that holding requires that this Court modify its original remittal and order that the Town issue a permit for the construction of the proposed 860,000 square foot mall project.

The respondents rely on a series of decisions that stand for the premise that, "[a] Court cannot by amendment change its **own** judgment regarding a substantive matter." *Bank of New York v. Carlucci*, 289 A.D.2d 349,350,734 N.Y.S.2d 609 (2d Dept. 2001); *see e.g. Owens v. Stuart*, 292 S.D.2d 677, 739 N.Y.S.2d 473 (3d Dept. 2002). This reliance is misplaced.

Section 7806 of the C.P.L.R. sets forth the types of relief that may be awarded in an Article 78 proceeding:

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

This list is not exclusive. Implicit in § 7806 is that the Court possesses the power to remand or "remit" the appropriate case to the administrative body for further proceedings. *See Skorin-Kauov v. State University of New York at Stony Brook*, 281 A.D.2d 632,722 N.Y.S.2d 576 (2d Dept.), *leave to appeal denied*, 96 N.Y.2d 720,733 N.Y.S.2d 372,759 N.E.2d 371 (2001); *see also New York Institute of Technology v. State Division of Human Rights*, 40 N.Y.2d 316,386 N.Y.2d 685,353 N.E.2d 598 (1976); *Matter of Aievoli v. State University of New York*, 264 A.D.2d 476,694 N.Y.S.2d 156 (2d Dept. 1999); *Rochester Colony, Inc. v. Hostetter*, 19 A.D.2d 250, ___, 241 N.Y.S.2d 210,215-216 (4th Dept. 1963); *Matter of Delicati v. Schechter*, 3 A.D.2d 19, 23-24, 157 N.Y.S.2d 715,721 (1st Dept. 1956). It is apparent from the above decisions that a remittal in an Article 78 proceeding is not considered to be a "judgment" within the meaning of C.P.L.R. § 7806. It necessarily follows that such a remittal is not then circumscribed by the prohibition against amending final judgments relied on by the respondents.

The respondents' contention that the July 8,2002 Decision and Order is a final order is also disingenuous. When the Article 78 proceeding terminates in a final judgment an appeal as of right lies

pursuant to C.P.L.R. § 5701(a)(1). Troy Ambulance Service, Inc. V. N.Y.S. Dept. Of Health, 260 A.D.2d 493,687 N.Y.S.2d 493 (3d Dept. 1999); Bruns v. Hanna, 101 A.D.2d 1015,476 N.Y.S.2d 684 (4th Dept. 1984); DePaula v. Memory Gardens, Inc., 90 A.D.2d 886,456 N.Y.S.2d 522 (3d Dept. 1982); Knieriemer Oil Company v. Lawe, 21 A.D.2d 797,250 N.Y.S.2d 763 (2d Dept. 1964). The decision of the Second Department in this case clearly indicates that the appeal was brought by respondents pursuant to C.P.L.R. § 5701(b)(1) because it dealt with an order rather than a final judgment. Section 5701(b)(1) provides that, “an order is not appealable to the Appellate Division as of right where it . . . is made in a proceeding against a body or officer pursuant to Article 78.” The Second Department has consistently held that this section is to be strictly construed. Skorin-Kapov, supra, 281 A.D.2d at ___, 722 N.Y.S.2d at 577; Russo v. Prendergast, 239 A.D.2d 423, ___, 658 N.Y.S.2d 331,332 (2d Dept. 1992). Additionally, the final page of this July 8,2002 Decision and Order indicates that it was a non-final disposition and that this Court retained jurisdiction over the matter. Thus, the Court retained the power to alter the terms of the order of remittal.

Any alteration of the July 8,2002 Decision and Order is governed by the application of the law of the case doctrine to the decision of the Second Department which affirmed that order. In People v. Evans, 94 N.Y.2d 484,502,706 N.Y.S.2d 678,680,727 N.E.2d 1232,___ (2000), Judge Smith discussed the law of the case doctrine in New York

The law of the case doctrine is part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a “full and fair” opportunity to litigate the initial determination (*see, Arizona v. California*, 460 U.S. 605,619, 103 S.Ct. 1382, 75 L.Ed.2d 318; *People v. Guerra*, 65 N.Y.2d 60, 63, 489 N.Y.S.2d 718,478 N.E.2d 1319; *Sales v State Farm Fire & Cas. Co.*, 902 F.2d 933,936 [11th Cir. 1990]). [footnote omitted].

The Court went on to distinguish the law of the case doctrine from both issue preclusion and claim preclusion:

Law of the case addresses the potentially preclusive effect of judicial determination made in the course of a single litigation *before* final judgment (*Matter of McGrath v. Gold*, 36 N.Y.2d 406,413,369 N.Y.S.2d 62,330 N.E.2d 35; *Walkerv Gerli*, 257 App.Div. 249,251, 12 N.Y.S.2d 942, *see generally*, Steinman, *Law & the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595 [1987]; 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4478). Res judicata and collateral estoppel generally deal with preclusion after judgment: res judicata precludes a party from asserting a *claim* that was litigated in a prior action (*see Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347, 690 N.Y.S.2d 478,712 N.E.2d 647), while collateral estoppel precludes relitigating an *issue* decided in a prior action (*see, Continental Cas. Co. V. Rapid-American Corp.*, 80 N.Y.2d 640,649,593 N.Y.S.2d 966,609,

N.E.2d 506). Accordingly, law of the case has been aptly characterized as “a kind of intra-action res judicata” (Siegel, New York Practice § 448, at 723[3ed.]).

Res judicata and collateral estoppel are rules of limitation recognized in the CPLR. Indeed, in a civil proceeding a party is entitled, by statute, to a dismissal based on issue preclusion or claim preclusion (*see* CPLR 3211[a][5]), both of which are also designated as affirmative defenses (*see* CPLR 3018[b]). Contrastingly, the law of the case doctrine is found in no New York statute. [footnote omitted].

94 N.Y.2d at 502, 706 N.Y.S.2d at 680-681. Finally, the Court pointed out that:

Beyond these procedural differences, law of the case rests on a foundation that further distinguishes it from issue and claim preclusion. Whereas the latter concepts are rigid rules of limitation, law of the case is a judicially crafted policy that “expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power” (*Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152). As such, law of the case is necessarily “amorphous” in that it “directs a court’s discretion,” but does not restrict its authority (*see, Arizona v. California*, 460 at 618, 103 S.Ct. 1382, 75 L.Ed.2d 318, *supra*). [footnote omitted].

94 N.Y.2d at 503, 706 N.Y.S.2d at 681.

The law of the case doctrine does not preclude a review of prior intermediate orders: “every court retains a continuing jurisdiction to reconsider any prior intermediate determination it has made’ during the pendency of an action.” *Budahas v. Board of Education of the City of New York*, ___ A.D.2d ___, 728 N.Y.S.2d 493, 494 (2d Dept. 2001) citing *Adrias v. Caserta*, 41 N.Y.2d 1059, 1061, 396 N.Y.2d 170, 172, 364 N.E.2d 835, ___ (1977). In this case, the intervening appellate review and affirmance mandates reconsideration of the July 8, 2002 Decision and Order.

The July 8, 2002 Decision and Order followed this Court’s review of the extensive administrative record, the petition and return, the briefs filed in support of the parties’ respective positions, and oral argument. The Court’s review was not a *de novo* review of the underlying ruling but rather a review under the arbitrary and capricious standard of C.P.L.R. § 7803.

The Second Department reviewed the record of the Article 78 proceeding in the same manner as this Court. This proceeding was not commenced pursuant to C.P.L.R. § 7804(g) where the Appellate Division would conduct a *de novo* review. Here, rather, the Appellate Division reviewed the entire record. Thus, the Appellate Division stood in this Court’s shoes for purposes of the scope of review. “What the trial court could have done, this Court can do.” *Republic Metalware Co. v. General Reinsurance Comoration*, 245 A.D. 232, 251 N.Y.S. 5, 14 (4th Dept.), *amended on other grounds* 246 A.D. 907, 282 N.Y.S. 993 (1935); *see Weckstein v. Breitbart*, 111 A.D.2d 6, ___, 488 N.Y.S.2d 665, 667 (1st Dept. 1985); *Conduit and Foundation Corp. v. State*, 74 A.D.2d 684, 425 N.Y.S.2d 874 (3d Dept. 1980), *modified on other grounds*, 52 N.Y.2d 1064, 478 N.Y.S.2d 516, 420 N.E.2d 397, *reargument*

denied, 53 N.Y.2d 798, 439 N.Y.S.2d 1030, 422 N.E.2d 596 (1981).

In reviewing the record and affirming this Court's July 8, 2002 Decision and Order, the Second Department found that, "[t]here was insufficient evidence to support a deviation from the initial SEQRA finding of the Town Environmental Quality Review Commission, which was in favor of the proposed project." It cannot be disputed that this constitutes a finding by the Second Department based upon its examination of the record, rather than mere dicta. The statement is not "extraneous, gratuitous and casually expressed. . . ." Peoule v. Bourne, 139 A.D.2d 210, ___, 531 N.Y.S.2d 899, 903 (1st Dept.), appeal denied, 72 N.Y.2d 955, 534 N.Y.S.2d 668, 581 N.E.2d 300 (1988). Furthermore, the issue was the subject of the July 8, 2002 Decision and Order, was argued before the Second Department and is factually relevant to the dispute between the parties. Id.: see Chiasson v. Dept. of Consumer Affairs, 138 Misc.2d 394, 524 N.Y.S.2d 649 (Sup. Ct. N.Y. Co. 1988). Moreover, in support of that finding, the Second Department cited, inter alia, the Court of Appeals case of Matter of Weok Broadcasting Corp. v. Planning Board of the Town of Lloyd, 79 N.Y.2d 373, 583 N.Y.S.2d 170, 592, N.E.2d 778 (1992) wherein the Court, in a case similar to the facts of the case at bar, invalidated a planning board decision which ignored findings contained in a draft Environmental Impact Statement and final Environmental Impact Statement. Such citation would be plainly unnecessary if the finding in question was mere dicta.

It is apparent that the parties had a "full and fair opportunity" to litigate the effect of the initial SEQRA finding of the Town Environmental Quality Review Commission before both this Court and the Second Department. The law of the case doctrine therefore, must be employed. "Under the doctrine of the law of the case, upon remittal, the issues in a case previously decided in the context of an Appellate Court review are conclusive." Steck v. Yorling, 227 A.D.2d 849, ___, 642 N.Y.S.2d 397, 398 (3d Dept. 1996) citing Matter of Acres Storage Co. v. Chu, 144 A.D.2d 758, 759, 535 N.Y.S.2d 165, 166 (3d Dept. 1988), appeal denied, 73 N.Y.2d 914, 539 N.Y.S.2d 294, 536 N.E.2d 623 (1989); Matter of Oyster Bay Associates Ltd. Partnershiu. et al. v. Town Board of Town of Oyster Bay, et al., 100 N.Y.2d 606, 1766 N.Y.S., 2d 160 N.E.2d 345, (2003).

In this case, the Second Department's determination that there was "insufficient evidence to support a deviation" from the initial SEQRA finding conclusively decided that issue of the size of the project since that initial finding favored the 860,000 square foot proposal. In so determining, the Second Department set the parameters for this Court's previous remittal order and rendered moot any requirement to consider the previously proposed 750,000 square foot mitigation. Indeed, the Court of Appeals has held that it is "improper to give [an] agency a second chance to prove its case." Laureano v. Kuhlmann, 75 N.Y.2d 141, 148, 551 N.Y.S.2d 184, ___, 550 N.E.2d 437, __ (1990) citing Matter of Hartie v. Coughlin, 70 N.Y.2d 866, 868, 523 N.Y.S.2d 462, ___, 517 N.E.2d 1348, __ (1987) (no remand should obtain where additional evidence was available but "unaccountably" withheld); see also, Matter of P.B.A. of the New York State Troopers v. Vacco, 253 A.D.2d 920, 921, 677 N.Y.S.2d 808, __ (3d Dept. 1998) (where "record is complete enough . . . to render final judgment on the merits remittal is not appropriate, especially where the agency is seeking a second chance to reach a different determination on the merits").

The July 8, 2003 Decision and Order is modified for an additional reason. In its affirmance of the July 8, 2002 Decision and Order, the Second Department essentially foreclosed the very action which the Town is presently attempting. It is apparent that the Town is currently seeking the achieve administratively that which it lost in front of the Second Department. By letter to the petitioners dated September 30, 2003, the Town improperly demanded that petitioners submit a new supplemental

environmental impact statement on essentially those grounds relied upon by the Town to support its action in originally denying the permit.² Furthermore, the Town requested that the petitioners file a new application and site plan for the previously proposed 750,000 square foot mitigation that the Town failed to consider prior to the denial of petitioners' application.

The Town, in attempting to compel a relitigation of the original administrative proceedings, is trying to accomplish that which the Second Department found impermissible in Kusky v. Town of Islip, 219 A.D.2d 603,632 N.Y.S.2d 138 (2d Dept. 1995). In that case, the Second Department held that an ocean beach was required under state code to have bathroom facilities. In reversing and remanding the case for further proceedings, the Second Department specified that the proceedings should include designating the number and location of the facilities to be constructed. The appellant, a residents' association, then applied to the Department of Health Services and was granted an exemption under an amended version of the relevant code. The appellant then moved to dismiss the Article 78 proceeding as academic in light of the exemption. The lower court gave preclusive effect to the Appellate Division's decision and order, and the Second Department affirmed the lower court. It held that its prior decision was binding upon the appellants and concluded: "It was, therefore, improper for [Seaview] to seek to avoid the effect of [the decision of the Second Department] by thereafter obtaining an administrative determination which was effectively adverse to and in conflict with the decision and order of this Court." Kusky v. Town of Islip, 219 A.D.2d at 604,632 N.Y.S.2d at 139.

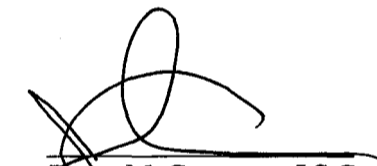
In a similar fashion, the Town now wishes to avoid the effect of the Second Department's decision and order by starting the administrative proceedings virtually from scratch. The Town, having lost the issue in the Second Department, cannot now restart the process.

Therefore, for the above reasons, this Court hereby modifies its **July 8, 2002** Decision and Order and the matter is remitted to the Town for the issuance of a building permit for the construction of the proposed 860,000 square foot shopping mall.

The above constitutes the decision and order of this Court.

ENTER

Date: November 25, 2003


James M. Catterson, J.S.C.

____FINAL DISPOSITION

NON-FINAL DISPOSITION

²Not only is the Town foreclosed from such action by the Second Department's decision and order, but the import of the Town's letter places the burden upon the Petitioners in direct contravention of this Court's original remittal. Thus, even if the remittal had been unaffected by the appellate process, the Town would still be precluded from pursuing its present course of action.