Noghrey v Town of Brookhaven

2004 NY Slip Op 30060(U)

January 29, 2004

Supreme Court, Suffolk County

Docket Number: 0018557/8557

Judge: Arthur G. Pitts

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SHORT FORM ORDER COPY INDEX No. 01-18557

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8/14/03
ADJ. DATE 10/30/03
Mot. Seq. # 001 - MotD
002 - XMD

---X
PARVIZ NOGHREY, :

Plaintiff,

:

- against - :

THE TOWN OF BROOKHAVEN and THE PLANNING BOARD OF THE TOWN OF BROOKHAVEN,

Defendants. :
---X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment and cross motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6 ;Notice of Cross Motion and supporting papers 7 - 15 ; Answering Affidavits and supporting papers ________ ; Replying Affidavits and supporting papers 16 - 22 ; Other ________ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Town of Brookhaven and the Planning Board of the Town of Brookhaven (hereinafter, "Town" and "Planning Board"), for an order dismissing the amended complaint pursuant to CPLR 3212 is granted as to plaintiffs fifth and eleventh causes of action and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff for partial summary judgment on the issue of liability on the fourth, sixth, eleventh and twelfth causes of action is denied; and it is further

ORDERED that the cross motion by plaintiff which seeks *de novo* review of the Bankruptcy Court's decision and order which purported to dismiss the fifth and eleventh causes of action for trial is denied; and it is further

ORDERED that plaintiffs second amended complaint is dismissed pursuant to CPLR 3215(c).

On June 14, 1989 plaintiff commenced the underlying action, alleging that defendants violated his constitutional rights by rezoning certain parcels that he owned and intended to develop for commercial use. Plaintiff asserts that defendants deprived him of his property in violation of his right to due process and effected an unlawful taking under the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of New York.

In 1994 plaintiff removed the action to the United States Bankruptcy Court for the Eastern District as an adversary proceeding shortly after filing a voluntary petition with that court under Chapter 11 of the Bankruptcy Code. By order and judgment dated August 11, 1998 Bankruptcy Judge Melanie L. Cyganowski denied plaintiffs motion for partial summary judgment on certain causes of action, alleging due process violations and, instead, *sua sponte,* granted summary judgment in favor of defendants as to those claims.

Plaintiff twice appealed Judge Cyganowski's decision. He first appealed to the United States District Court for the Eastern District of New York. By order dated March **9,** 2001, the United States District Court (Hon. Denis R. Hurley) dismissed the appeal on the federal procedural ground that the appeal was of an interlocutory order. By Bankruptcy Court order dated June 13,2001 (Hon. Melanie Cyganowski), the bankruptcy proceeding was dismissed, the adversary proceeding was transferred back to the Supreme Court, Suffolk County, and the action was re-assigned Index No. 01-18557.

After the adversary proceeding was transferred to the Supreme Court, Suffolk County, plaintiff voluntarily filed the Bankruptcy Court's August 11, 1998 order and judgment with the Clerk of this Court. Plaintiff then appealed directly to the Appellate Division, Second Department. The Second Department dismissed the appeal, holding that it did not have jurisdiction to review Judge Cyganowski's orders under the present circumstances (see, ***Noghrey v Town of Brookhaven,*** 304 AD2d 474,760 NYS2d 195 [2003]).

Noghrey's amended complaint alleges thirteen causes of action against the Town of Brookhaven and the Planning Board of the Town of Brookhaven. In general, the first through sixth causes of action concern Diamond Plaza, 4.3 acres of vacant land on the corner of Middle Country Road and Wading River Hollow Road, Middle Island, New York, which Noghrey purchased on September 30, 1985; and the seventh through twelfth concern Liberty Plaza, 3.4 acres of vacant land on the corner of Middle Country Road and Curran's Road, Middle Island, New York, which he purchased on August 26, 1985. These first twelve causes of action essentially paralleled one another as to the two parcels. The thirteenth cause of action seeks a declaratory judgment, declaring that the resolutions adopted by the Town Board which rezoned plaintiff's parcels were ineffective. Plaintiff previously moved for and was granted partial summary judgment as to the thirteenth cause of action. The order granting that motion was affirmed by the Appellate Division, Second Department (see, ***Noghrey v Town of Brookhaven,*** 214 AD2d 659,625 NYS2d 268 [19951). Subsequently, however, the Town rezoned the properties back to B-1 Residence. Accordingly, the thirteenth cause of action is moot.

The substance of plaintiff's remaining twelve causes of action may be summarized as follows:

First and Seventh Causes of Action: Noghrey alleges that by reason of the substantial money spent and obligations incurred in reliance on the J-2 Business zoning

classification, he acquired a substantial property interest which could not be deprived by a change in zoning, and he thus has a vested right to shopping center use;
Second and Eighth Causes of Action: Noghrey alleges that he earned the right to develop both parcels under their commercial zoning classification by reason of defendants' willful or negligent delay which ultimately prevented him from securing site plan approval;
Third and Ninth Causes of Action: Noghrey alleges that the change in the zoning classification reduces the value of the parcels to less than his investment, permits no reasonable return, and is therefore confiscatory.
Fourth and Tenth Causes of Action: Noghrey alleges that the change from J-2 Business to B-1 Residence has prevented any reasonable use of the parcels, resulting in the denial of substantive due process;
Fifth and Eleventh Causes of Action: Noghrey alleges that defendants deprived him of any reasonable income-productive use of the parcels, destroyed the greater part of their value, and deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and
Sixth and Twelfth Causes of Action: Noghrey alleges that defendants have effected a taking of his property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Defendants now move for an order pursuant to CPLR 3212 dismissing the amended complaint and all causes of action in their entirety. Defendant argues that the Bankruptcy Court's written decision dated June 24, 1998, and order and judgment dated August 11, 1998, pursuant to which plaintiffs fifth and eleventh causes of action alleging due process violations were dismissed, should have preclusive effect as to the remaining causes of action under the doctrine of "law of the case" ***(see, People v Evans,*** 94 NY2d 499 at 502-04, 706 NYS2d at 680-83 [2000]).

This court finds that the preclusive effect of the Bankruptcy Court's order is limited. Initially, the court finds that the parties had a "full and fair" opportunity to be heard on these issues, and, therefore, issue preclusion is warranted with respect to the Bankruptcy Court's determination that plaintiff did not have a constitutionally-protected property interest in the Planning Board's site plan approval.

Since the fifth and eleventh causes of action that were purportedly dismissed by the Bankruptcy Court (damages pursuant to 42 USC § 1983) are based upon the fact that there was no protected right in such a plan, they were properly dismissed. The Bankruptcy Court's finding that the Planning Board's discretion with respect to site plan applications is broad and allows for a wide range of determinative considerations is granted preclusive effect. Plaintiff had no right in having the site plan approved because that is a discretionary function of the Planning Board. Accordingly, the fifth and eleventh causes of action are dismissed.

Although there may be some overlapping elements, the legal elements required to prove the fifth and eleventh causes of action are very different from the legal elements required to prove the remaining causes of action. Plaintiff describes his remaining claims as: "(a) damages based upon a regulatory taking; (b) action to declare that plaintiffs parcels remain subject to J-2 zoning based upon 'special

facts'; (c) action to declare plaintiffs second rezoning invalid."' Furthermore, although not raised as a defense, the fourteenth cause of action would be clearly time-barred, since it is in the nature of an Article 78 proceeding (CPLR 3217).

Plaintiffs remaining ten causes of action are based on "regulatory taking" claims (third, fourth, sixth, ninth, tenth and twelfth causes of action) or claims under the "special facts" doctrine (first, second, seventh and eighth causes of action).

On a motion for summary judgment movant has the initial burden of setting forth evidentiary facts sufficient to establish its entitlement to judgment as a matter of law (see, ***Fabbricatore v Lindenhurst Union Free School District,*** 259 AD2d 659, 686 NYS2d 822 [2d Dept 19991; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Only then does the burden shift to the opposing party to come forward with proof (see, ***Piccolo v DeCarlo,*** 90 AD2d 609, 456 NYS2d 171 [3d Dept 19821). The moving party has not established a prima facie case as a matter of law. Defendants have submitted no proof whatsoever to establish the change in zoning did not affect a regulatory taking. Furthermore, defendants did not establish that their action, namely the rezoning, did not result in a significant diminution in the value of plaintiffs properties.

With respect to plaintiffs claims under the "special facts" doctrine, defendants' prima facie proof is lacking. Under this doctrine, where a public official engages in dilatory tactics, unexplained delays or other bad faith conduct in issuing or refusing to issue requested approvals (whether it be site plan approval, building permits approvals, etc.) and the Town then changes the zoning, the property owner would acquire a vested right in the prior zoning classification (see, ***Figgie International Inc. v Town of Huntington, 203*** AD2d 416, 610 NYS2d 563 [19941). Factually, defendants' alleged wrongful and dilatory conduct was set forth in detail in plaintiffs prior summary judgment motion. In addition, Justice Lama already held that causes of action based on "special facts" were meritorious in his order dated March 26, 1991. Justice Lama's findings and conclusions were never appealed. In light of the evidence in the record, coupled with Justice Lama's findings and conclusions, it is frivolous for defendants to argue that the causes of action based on "special facts" fail to state a cause of action.

Plaintiffs cross motion for partial summary judgment on the issue of liability on the fourth, sixth, eleventh and twelfth causes of action is also denied on the grounds that the moving party has failed to make a prima facie showing of entitlement to judgment as a matter of law.

Plaintiff claims that defendants' rezoning affected a regulatory taking because it allegedly reduced the value of plaintiffs parcels "to all but a nominal value" and deprived him of his "investment

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'While plaintiffs partial summary judgment motion was pending before Bankruptcy Judge Cyganowski, plaintiff apparently filed a second amended complaint dated June 11, 1997. According to the parties that complaint is virtually identical to the amended complaint with the exception of the fourteenth cause of action, which is the "action to declare plaintiffs second rezoning invalid." Since 1997 plaintiff has failed to prosecute the fourteenth cause of action or to move for a default against defendants. On January 29,2002 plaintiff filed a note of issue with a certificate of readiness stating that issue was joined on August 7, 1989 and that all pleadings had been served. Therefore, this Court shall not give any consideration to the second amended complaint, and the Court dismisses that pleading on its own initiative as abandoned pursuant to CPLR 3215(c).

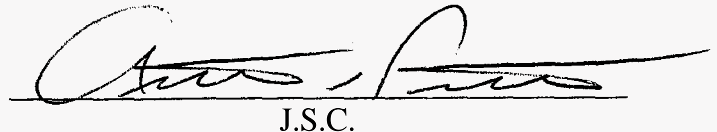
backed expectations" and the "economically viable use" of his properties. However, the proofs submitted fail to show that the economic value, or all but a bare residue of the economic value of the parcels, has been destroyed by defendants' rezoning.

Plaintiff fails to prove the fair market value of the parcels at the time of purchase or as presently zoned. Although plaintiff alleges that he could have obtained $3.6 million for Diamond Plaza and Liberty Plaza prior to the rezoning, his evidence fails to support that assertion. Plaintiff submits what appears to be an unexecuted contract of sale relating to some unspecified property. These documents hardly suffice to establish that plaintiff could have received **$3.6** million for the sale of Diamond Plaza and Liberty Plaza prior to the change in zoning.

Likewise, the $60,000 bid that plaintiff may have received at a bankruptcy auction in 1995 does not provide an accurate reflection of the parcels' fair market value following a rezoning which occurred six years earlier. In addition, plaintiff offers no evidence of the return which may be realized from uses permitted under the current zoning.

Accordingly, plaintiffs cross motion for partial summary judgment is denied in all respects.

Dated: January 29,2004



J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION