COPY

SHORT FORM ORDER

INDEX NO. 29553/03

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

PRESENT:
Honorable JAMES M. CATTERSON

R/D: 01-05-04
MOTION NO.: 001 Mot-D

Application of

MARY S. ZUPA,

Petitioner,

For a Judgment Pursuant to C.P.L.R. Article 78

-against-

ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHOLD and PARADISE POINT ASSOCIATION, INC.,

Respondents.

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Atty for Paradise Point Association, Inc.
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Upon reading and filing the following papers in this matter: (1) Order to Show heard in this Court January 5,2004 and supporting papers (including Petitioner's Memorandum of Law in Support of Petition) by petitioner; (2) Return volumes I, II, II, IV, and V, pages 1 - 1421 by respondent Zoning Board of Appeals of the Town of Southold; (3) Affidavit received in this Court January 5,2004 and supporting papers by respondent Paradise Point Association, Inc.; (4) Memorandum of Law submitted on behalf of respondent Paradise Point Association, Inc. dated January 2,2004 by respondent Paradise Point Association, Inc.; *(5)* Verified Answer dated December 30,2003 by respondent Paradise Point Association, Inc.; (6) Verified Answer dated December 23,2003 by respondent Zoning Board of Appeals of the Town of Southold; (7) Memorandum of Law Zoning Board of Appeals of the Town of Southold by respondent Zoning Board of Appeals of the Town of Southold; and now,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing, the motion is decided as follows:

ORDERED that the December 4,2003 decision of the respondent Zoning Board of Appeals of the Town of Southold is vacated and the matter remitted for proceedings consistent with this decision. It is further

ORDERED that counsel for the petitioner is directed to serve a copy of this Order upon the respondents in this matter.

The facts in this C.P.L.R. Article 78 petition are largely undisputed. In 1995 James and Barbara Miller were contract vendees for the purchase of a vacant 1.7 acre parcel of residential real property located at 580 Basin Road, Southold, New York.' The property is located within a homeowners association known as Paradise Point Association, Inc. [a respondent in this petition]. **As** contract vendees, the Millers applied to the Southold Town Building Department [hereinafter referred to as the "Building Department"] for a permit to construct a single family residence at 580 Basin Road. The Building Department denied the application on the grounds that, inter alia, approval of the respondent Zoning Board of Appeals of the Town of Southold [hereinafter referred to as the "ZBA"] was required for a setback variance and a second use on property in a residential area. The Building Department determined that a set of docks on the property utilized by the homeowners association constituted a second use that was prohibited under the town code.

The ZBA denied the Millers' application on August 23, 1995 on the grounds that, inter alia, there were "alternatives for [the Millers] to pursue to better plan for existing marina uses or for a principal residential building which will better fit within an appropriate upland area with greater setbacks from the water and wetland areas, with less reduction in setbacks and less relief." The Millers did not challenge the decision in an Article 78 proceeding, nor did they purchase the property in question following the decision.

Petitioner Mary Zupa [hereinafter referred to as "Zupa"] purchased the subject property by deed of April 5, 2002.[2] Zupa then applied to the Building Department to construct a single family residence on the property. The Building Department denied the application and Zupa appealed to the ZBA. Ultimately, the ZBA issued a decision on December 4, 2003 denying the Zupa application on the grounds of res judicata and collateral estoppel. For the reasons that follow, that decision is vacated and the matter remitted to the ZBA for proceedings consistent with this decision.

In 1916, then Chief Judge Bartlett of the Court of Appeals held that:

> 'Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.'

Fish v. Vanderlip, 218 N.Y.29, 36-37, 112 N.E. 425 (1916) quoting Greenleaf s Evidence §§ 522-523. That principle is no less valid today.

The doctrine of estoppel in New York is derived from the English Common Law with roots

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'At the time of the Millers' application, the property was owned by Chance Curry, Gilman Hallenbeck, Gary Sinning, and Paradise of Southold, Inc.

[2]There is no copy of that deed in the return or in any of the papers submitted to the Court in support of or in opposition to the petition.

dating to Roman times. "The rule is that a judgment in another action cannot be admitted, save for or against parties or privies to it; it being received on the principles of estoppel, to which, it is essential that it should be mutual." St. John v. Fowler, 229 N.Y. 270,274, 128 N.E. 199, __, (1920) reargument denied, 229 N.Y. 608, 129 N.E. 927 (1921) citing Boothv. Powers, 56 N.Y. 22, 11 Sickels (1874). Similarly, in United State Fire Insurance Co. v. Adirondack Power & Light Corn., 206 **A.D.** 584, __, 201 N.Y.S. 643,646 (3d Dept. 1923) the Court held that:

> The estoppel of a former judgment does not depend upon technicalities, but rests on the broad principle of justice, that an issue once finally determined between the parties on the merits cannot be litigated afterward. It is a rule of convenience and public policy. It is not a rule, which for the sake of technical congruity stands in the way of substantial justice.
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> "A judgment is not conclusive of any matter which, from the nature of the case, the form of the action, or the character of the pleadings, could not have been adjudicated in the former suit." Black on Judgments, vol. 2 (2d Ed.) § 618.

Almost a century later in Buschel v. Bain, 97 N.Y.2d 295, 303, 740 N.Y.S.2d 252,257,766 N.E.2d 914, __, (2001) the Court of Appeals reiterated that, "[c]ollateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." Citing Rvan v. New York Telephone Company, 62 N.Y.2d 494, 500,478 N.Y.S.2d 823, 826,467 N.E.2d 487 (1984). The Court set out the test to be employed:

> Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling ***(see, Gilberg v. Barbieri,*** 53 N.Y.2d 285,291,441 N.Y.S.2d 49,423 N.E.2d 807 ([1981]). The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party ***(see, id.)*** The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.

97 N.Y.2d at 303-304, 740 N.Y.S.2d at 257, 766 N.E.2d at __; see Davidson v. American Bio Medical Corn., 299 A.D.2d 390, __, 749 N.Y.S.2d 98, 99 (2d Dept. 2002); Rigopolous v. American Museum of Natural Historv, 297 A.D.2d 728, __, 747 N.Y.S.2d 566,568 (2d Dept. 2002); Lozada v. GBE Contracting;Corp., 295 A.D.2d 482, __, 744 N.Y.S.2d 464,465 (2d Dept. 2002).

> The doctrine of res judicata or 'claim preclusion' employs a similar test:
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> Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon difference theories or if seeking a different remedy." Thus, where a plaintiff in a later action brings a claim for damages that could have been presented in a prior Article 78 proceeding against the same party,

based upon the same harm and arising out of the same related facts, the claim is barred by res judicata.

Parker v. Blauvelt Volunteer Fire Co. Inc., 83 N.Y.2d 343,347-348,690 N.Y.S.2d 478,481,712 N.E.2d 647, 649-650 (1999) (citations omitted). See Wavlouis v. Baum, 281 A.D.2d 636, __, 723 N.Y.S.2d 55, 57 (2d Dept. 2001); Ordenana v. Weber, 269 A.D.2d 580,707 N.Y.S.2d 111,112 (2d Dept. 2000) ("The doctrine of res judicata applied only to the transaction or series of transactions; it does not extend to all causes of action arising out of a course of dealing between parties and those in privity with them.").

The doctrines of collateral estoppel and res judicata are both applicable to proceedings brought pursuant to C.P.L.R. Article 78. Honess 52 Corp. v. Town of Fishkill, 266 A.D.2d 510,698 N.Y.S.2d 718 (2d Dept. 1999) leave to appeal denied, 84 N.Y.2d 762,708 N.Y.S.2d 5 1,729 N.E.2d 708 (2000) (collateral estoppel); Pavic v. Board of Trustees, 111 A.D.2d 17,488 N.Y.S.2d 685 (1st Dept. 1985) aff'd 68 N.Y.2d 702, 506 N.Y.S.2d 308,497 N.E.2d 675 (1986) (res judicata).

Both respondents cite Jensen v. Zoning Board of Appeals of The Village of Old Wesbury, 130 A.D.2d 549, 5 15 N.Y.S.2d 283 (2d Dept.) appeal denied, 70 N.Y.2d 611 (1987) for the proposition that, "absent a change in facts or circumstances, or a decision to grant a rehearing, a property owner, or subsequent landowner, cannot in a subsequent application, cure deficiencies in a prior application, where the application resulted in a determination, or again attempt to persuade a Board to grant relief which previously was denied." Respondent Paradise Point Memorandum of Law at page 7; see also respondent Zoning Board of Appeals Memorandum of Law at pages 5 and 8. This position represents a considerable distortion of the holding of Jensen, supra. In Jensen, the Second Department reaffirmed the applicability of both doctrines to CPLR Article 78 determinations and held that petitioner must demonstrate a "change in material fact" to proceed with a subsequent application for a variance. 130 A.D.2d at ___, 515 N.Y.S.2d at 284-285. However, the fact omitted from both respondents' analysis is that the petitioner in Jensen, supra, was the same party who had commenced a prior application for a variance before the same Zoning Board of Appeals for essentially the same relief. Thus, Jensen, supra, simply did not address the question of whether the earlier determination of the Zoning Board of Appeals would bind a ***subsequent*** landowner.

In the instant case, it is undisputed that Zupa was not party to the ZBA's 1995 decision on the Millers' application. Thus, any application of either collateral estoppel ***or*** res judicata against Zupa necessarily first turns on the question of privity.

Respondent Paradise Point contends that the case of Miller v. Board of Zoning Appeals for the Village of Westbury, New York Law Journal, August 16,2000, page 26, col. 1 (Sup. Ct. Nassau Co. 2000) stands for the proposition that, **"[a]** subsequent landowner is bound by the determinations and findings of fact of a zoning board of appeals made prior to the ownership of the property, absent changed facts or circumstances." See Respondent Paradise Point's Memorandum of Law at page 9.

The Supreme Court in Miller [no relation to the Millers in the instant case] held that contract vendees who applied for a variance were in "direct privity" with the vendors' prior application and henceforth subject to the doctrine of collateral estoppel. The Court further held that as contract vendees, the petitioners in the latter proceeding were also barred by collateral estoppel because they "acquired a conditional interest in the subject parcel after the rendition of judgment (in the prior application to the Zoning Board of Appeals)." Citing Matter of Commercial Casualty Insurance Company (Tremaine), 257

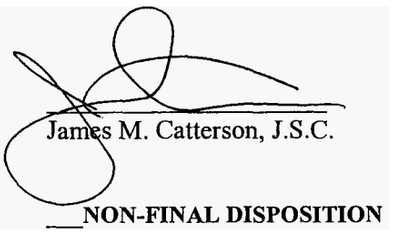
A.D. 536, 539, 13 N.Y.S.2d 754, 757-758 (3d Dept.) reargument denied 257 A.D.1080, 14 N.Y.S.2d 807 (3d Dept.) leave to appeal denied 281 N.Y. 885 (1939). The facts in Miller are also instantly distinguishable from those of the instant petition. In Miller, the petitioners were contract vendees of the original applicant to the ZBA and thus stood in direct privity with that original applicant. There is no such relationship between Zupa and the Millers who were contract vendees of the original owners of the lot in question. Indeed, Zupa has no legally recognized relationship with the Millers. She was not a party to the contract with the Millers, nor did she own the property at the time of the original ZBA decision. Finally, Zupa had no contractual relationship with the original owners at the time of the original ZBA decision.

The ZBA in its decision of December 4, 2003 appears to assume privity between Zupa and the Millers. The return of the instant petition contains various discussions and legal memoranda on this issues of res judicata and collateral estoppel. However, the Court was unable to discern any evidence of record that establishes privity between Zupa and either the Millers or the title owners to the property at the time of the Millers' application.[3]

Ordinarily, the party seeking to invoke the doctrines of res iudicata or collateral estoppel has the burden of proving the requisite elements, first and foremost of which is the threshold question of privity. See Parker v. Blauvelt Volunteer Fire Company, Inc., supra, 93 N.Y.2d 343, 690 N.Y.S.2d 478, 712 N.E.2d 647; Ryan v. New York Telephone Company, suura, 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487. However, this is a proceeding brought pursuant to the C.P.L.R. Article 78 and the question before the Court is whether the ZBA's legal conclusion that the Zupa appeal was barred by the application of res judicata and collateral estoppel is arbitrary and capricious and without support in the record. The representations of counsel for respondent Paradise Point Association, Inc. regarding privity are insufficient to support the December 4, 2003 decision of the ZBA as they were not before the ZBA prior to that decision. The submissions by counsel for the ZBA are also barren of citation to the record. Similarly, although the Court is under no duty to search the record as contained in the return, the Court was simply unable to locate anything in the record before the ZBA that supports any assertion of privity between Zupa and the Millers. See e.g., Oyster Bay Associates Limited Partnership v. The Town Board of the Town **of** Oyster Bay, 300 A.D.2d 410, 755 N.Y.S.2d 671 (2d Dept. 2003). Therefore, the decision of December 4, 2003 is vacated and the matter is remitted to the ZBA for proceedings consistent with this decision.

The above constitutes the decision and order of the Court.

ENTER



James M. Catterson, J.S.C.

Date: May 6, 2004

_/FINAL DISPOSITION

___NON-FINAL DISPOSITION

[3]Counsel to respondent Paradise Point Association, Inc. referred to the issue in an affirmation of January 2, 2004 at paragraph 9 and in the Memorandum of Law in Opposition to the Petition of the same date. However, there is no citation to the return nor the record before the ZBA.