

**Matter of Caltagirone v Zoning Board of Appeals**

2006 NY Slip Op 30430(U)

May 3, 2006

Supreme Court, Orange County

Docket Number: 2196/06

Judge: Lewis Jay Lubell

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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. LEWIS J. LUBELL, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

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In the Matter of the Application of PETER  
CALTAGIRONE, PATRICIA INNIS, JAMES &  
JENNIFER MOORE,

Petitioners,

-against-

ZONING BOARD OF APPEALS, TOWN OF  
NEWBURGH, NY, GRACE CARDONE: CHAIRPERSON,  
Z.B.A. BOARD,

Respondents.

To commence the statutory time  
period for appeals as of right  
(CPLR 5513 [a]), you are  
advised to serve a copy of this  
order, with notice of entry,  
upon all parties.

Index No.2196/06  
Motion Date: April 28, 2006

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The following papers numbered 1 to 6 were read on this petition for a CPLR Article 78 proceeding seeking to overturn a decision of the Zoning Board of Appeals of the Town of Newburgh, NY:

Notice of Petition-Petition-Exhibits 1-3

Answer-Objections in Point of Law 4

Memorandum of Law in Opposition 5

Reply 6

Upon the foregoing papers it is ORDERED that the petition is disposed of as follows:

Petitioners, abutting property owners of the subject property, commenced an Article 78 proceeding seeking to overturn a decision of the Zoning Board of Appeals of the Town of Newburgh, NY dated January 18, 2006 and filed on February 27, 2006 which granted a variance

to Gilbert and Jeanne Halstead, the owners of the property in dispute, and indirectly to Mark Coppola, the prospective purchaser of the Halstead property. Petitioners urge this Court to declare that the Zoning Board's decision was arbitrary, capricious and irrational and exceeded its authority.

Respondents submit that the action must be dismissed on a number of bases, not the least of which that the Halsteads and Mr. Coppola were never named as parties to this action, that the applicable statute of limitations has passed to name them as parties, and that such a failure necessitates dismissal of the petitioners' action. Petitioners respond by urging the Court to permit an amendment of the petition to include these unnamed individuals as defendants even after the expiration of the statute of limitations.

The threshold question which must be determined is whether the Halsteads and Mr. Coppola were necessary parties to this action and whether the petitioners' failure to name them requires that the action be dismissed pursuant to CPLR § 3211(a)(10). CPLR 1001(a) defines necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

The variance granted to the Halsteads by the Zoning Board of Appeals permits the demolition of the existing home on the subject premises and the building of a non-conforming home on that site. The property owners of the subject real property to whom the challenged variance was issued, i.e. the Halsteads, will most certainly be adversely affected if the relief requested in the petition is granted and therefore are necessary parties. *See, Manupella v Troy City Zoning Board of Appeals*, 272 AD2d 761, 763 (3<sup>rd</sup> Dept. 2000); *O'Connell v Zoning Board*

*of Appeals of Town of New Scotland*, 267 AD2d 742, 743 (3<sup>rd</sup> Dept. 1999).

Town Law §267-c establishes a statute of limitations for all Article 78 proceedings stemming from a decision of a zoning board of appeals, with the action having to be filed against all parties within 30 days after the decision of the board is filed in the office of the town clerk. It is undisputed in this case that the respondents' decision was filed on February 27, 2006, giving petitioners until March 29, 2006 to file their special proceeding against all necessary parties. It is further undisputed that the Halsteads were not named in the special proceeding and that the time within which to do so expired on March 29, 2006.

Petitioner Caltagirone appeared before respondents in a public hearing in opposition to the granting of the variance and were undeniably aware that the Halsteads were owners of the subject property and applied for the variance. As such, there was no question as to their identity. In fact, petitioner Caltagirone specifically stated in his reply that he contacted the Halsteads prior to instituting this action and he purposely did not name them at their request. The Halsteads did not voluntarily appear in this action, and joining them under these circumstances after the expiration of the statute of limitations is not generally favored. *See, Manupella*, 272 AD2d at 764; *O'Connell*, 267 AD2d at 743-744.

Having already determined that the Halsteads are necessary parties to this action, and that the applicable statute of limitations has expired without the Halsteads being named, the next issue is whether the respondents are united in interest with the Halsteads such that an action against the Halsteads would relate back to the filing date of the petition pursuant to CPLR § 203[c].

The Appellate Division, in *Brock v. Bua*, 83 A.D.2d 61, 443 N.Y.S.2d 407, *supra*, gave the rule a three-prong specificity, patterned largely after the Federal "relation back" test codified in rule 15[c] of the Federal Rules of Civil Procedure ( *see generally*, 1 Weinstein-Korn-Miller, N.Y.Civ.Prac. ¶ 203.05, at 2-92, 2-93;

*compare also, Duffy v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476-477, 497 N.Y.S.2d 890, 488 N.E.2d 820). The *Brock* test examines whether (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well ( *Brock v. Bua, supra*, 83 A.D.2d at 69, 443 N.Y.S.2d 407). All three features must be met for the statutory relation back remedy to be operative.

*Mondello v New York Blood Center-Greater New York Blood Program*, 80 NY2d 219, 226 (1992).

Clearly, the claims against both the ZBA and the Halsteads arose out of the same transaction. While the respondents and the Halsteads both have the same purpose in maintaining the status of the granted variance, that reason alone does not create a unity of interest between the respondents and the Halsteads. *See, Red Hook/Gowanus Chamber of Commerce v New York City Board of Standards and Appeals*, 5 NY 3d 452, 457 (2005). In this case, while the respondents have an interest in seeing their decision upheld, that interest is purely an administrative one. The Halsteads have a financial interest in the decision completely irrelevant to the respondents' interest. In order for the Halsteads to sell the property to Mr. Coppola, a variance to build a non-compliant structure on the premises was required. Given the fact that the property was already non-compliant but grandfathered, any new construction on the subject premises required a variance. These divergent interests between the Halsteads and the respondents cannot be guaranteed to protect the Halsteads from future prejudice in this case. *See, Red Hook*, 5 NY3d at 457. Thus, at least one of the three prongs of the *Brock* test cannot be satisfied and therefore the relation back doctrine is unavailable to petitioners.

The next question for determination is whether the failure to join the Halsteads as necessary parties may be excused. CPLR 1001(b) states as follows:  
 When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
3. whether and by whom prejudice might have been avoided or may in the future be avoided;
4. the feasibility of a protective provision by order of the court or in the judgment; and
5. whether an effective judgment may be rendered in the absence of the person who is not joined.

In the first place, the Court may not compel the joinder of the Halsteads to this action due to the lapsed statute of limitations since the Court does not have jurisdiction over them. As expressed in *Graziano v Walsh*, 189 Misc2d 680 (N.Y.Sup.,2001):

In the final analysis, whether viewed through the prism of a lack of personal jurisdiction, failure to join a necessary party (see CPLR 1001 ) or failure to comply with the 14 day Statute of Limitations (see CPLR 201, "No court shall extend the time limited by law for the commencement of an action."), this Court's hands are tied. A court may not simply reach the "right" result, heedless of such crucial procedural safeguards as timeliness, service and notice. Our society can sooner tolerate one more (supposedly undeserving) person on the ballot than it can turn a blind eye toward due process.

*Graziano*, 189 Misc2d at 686. Therefore the Court must resort to an analysis of the five factors enumerated in CPLR 1001(b).

The first factor is whether the petitioners will have an effective remedy in the event of

dismissal. Although the statute assigns no particular weight to the five factors, it is noteworthy that petitioner's ability to obtain relief is listed first. In the instant case, it is clear that absent an Article 78 proceeding, petitioners will not be able to reverse the decision of the ZBA.

Second on the list of factors is an evaluation of the prejudice that may accrue to the absentee if the nonjoinder is excused. In effect, this factor revisits the prejudice criteria in CPLR1001(a) by which the court determined the Halsteads' status as necessary parties. The Halsteads are the property owners and their ability to sell their property or build thereon in accordance with zoning bylaws or obtaining variances therefrom is critical to this action. If the petition is granted, the Halsteads would be unduly prejudiced in that the variance granted them would be potentially voided without their participation in violation of their due process rights. Factor three again addresses prejudice, but with the focus on an existing party's responsibility for contributing to the prejudice or taking steps to help avoid it. This prejudice could certainly have been avoided if petitioners simply included the Halsteads prior to the expiration of the statute of limitations. Petitioners offer the only excuse as the Halsteads asked not to be included and for the sake of community peace, petitioners abided by their request (in spite of the fact that petitioners knew that the Halsteads' property rights would be adversely affected by the outcome of this action).

The fourth factor directs the court to consider whether protective measures might be taken to minimize prejudice either during the litigation or by some provision in the judgment. Since the validity of the variance is the very thing petitioners seek to have voided, the Halsteads' interest cannot be adequately protected by this Court in their absence.

The fifth factor is similar to the fourth in that it asks whether an "effective" judgment is possible despite the Halsteads' nonjoinder. It is inappropriate for this action to proceed if the likely

judgment would be so hollow or inconclusive that it would be a waste of the court's and the parties' time to proceed with the litigation. See, e.g., *Anderson v Town of Lewiston*, 244 AD2d 965 (4<sup>th</sup> Dep't. 1997), appeal dismissed, 91 NY2d 920 (1998) (judgment against Town ordering restoration of plaintiff's water service would be futile because such service ultimately depended on consent of Indian nation, as to which jurisdiction could not be obtained). In this case, through their own error, petitioners created the prejudice that will accrue to them if this matter is dismissed, while the Halsteads did not cause themselves to suffer this prejudice. There can be no effective judgment in this matter without the Halsteads' participation, and the Court is without authority, given the enumerated factors, to direct their participation or permit the action to proceed without them. Therefore, this action is dismissed with prejudice.

The foregoing constitutes the decision and order of the court.

Dated: May 3, 2006            E N T E R  
Goshen, New York

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HON. LEWIS J. LUBELL, J.S.C.

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