

EMB Enters., LLC v Town of Riverhead
2007 NY Slip Op 30488(U)
March 7, 2007
Supreme Court, Suffolk County
Docket Number: 0029010/2004
Judge: Edward D. Burke
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon EDWARD D. BURKE
Justice of the Supreme Court

MOTION DATE 8-1-06
ADJ. DATE 9-12-06
Mot. Seq. # 003 - MotD
004 - XMD

-----X	
EMB ENTERPRISES, LLC,	:
	:
Petitioner/Plaintiff,	:
	:
- against -	:
	:
TOWN OF RIVERHEAD and TOWN BOARD OF	:
THE TOWN OF RIVERHEAD,	:
	:
Respondents/Defendants.	:
-----X	

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Upon the following papers numbered 1 to 56 read on these motions for summary judgment and for leave to reargue and renew; Notice of Motion and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 45; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 46 - 56; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the parts of petitioner’s motion which are for summary judgment and for leave to renew are denied and it is further

ORDERED that the part of petitioner’s motion which is for leave to reargue is granted and upon reargument that part of respondents’ motion for dismissal, which was previously granted in the Court’s prior order dated December 29, 2005, is now denied and it is further

ORDERED that respondents’ cross motion for leave to reargue so much of this Court’s prior order of December 29, 2005, as denied their motion for dismissal, being construed as a motion to renew, is denied.

ORDERED that respondents shall serve and file their answer to the petition within thirty (30) days of the date of this order, after which the petitioner shall re-notice its petition as contemplated by CPLR 7804 on not less than ten (10) days notice to the respondents.

The petitioner moves for leave to renew and/or reargue this Court’s previous order of December 29, 2005 to the extent that dismissal of the petitioner’s hybrid proceeding pursuant to CPLR 3211 (a) (1)

was granted as to the petitioner's claim that the re-zoning of its property to RB-80 under Resolution 1089 did not conform to the provisions of the Town of Riverhead Comprehensive Plan (Comprehensive Plan) which had placed most of the petitioner's property in a Business CR district. The petitioner also moves for summary judgment.¹ The petitioner seeks that upon leave being granted that respondents' motion be denied in its entirety. The respondents oppose the petitioner's motion and cross move for reargument of so much of the Court's previous order as denied their motion to dismiss the petition. Oral argument on these motions was heard on January 31, 2007.

A motion for summary judgment must be supported by a copy of the pleadings (CPLR 3212[b]). Here the petitioner has failed to submit a copy of the respondents' answers to the petition. Accordingly, that branch of the petitioner's motion which is for summary judgment is denied with leave to renew upon submission of a copy of all of the pleadings (*Matsyuk v Konkali*, 35 AD2d 675, 824 NYS2d 918 [2006]).

The petitioner has submitted in support of its motion to reargue and/or renew, inter alia, the affirmation of its attorney, a copy of this Court's prior order dated December 29, 2005 with notice of entry dated January 3, 2006, a copy of the Riverhead Town Resolution 674, a memorandum decision of Justice Sgroi dated February 28, 2005 and captioned "In the Matter of the Application of Kensington Development of Suffolk, Ltd...against Town of Riverhead Planning Board" (Kensington) and a videotape of Riverhead Town Board meetings.

"Motions for reargument are addressed to the sound discretion of the Judge who decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Delcrete Corp. v. Kling*, 67 A.D.2d 1099, 415 N.Y.S.2d 148)" (*Rodney v. New York Pyrotechnic Products Co.*, 112 A.D.2d 410, 411, 492 N.Y.S.2d 69, 70 [1985]). The motion for leave reargue cannot include any matters of fact which were not submitted on the prior motion (CPLR 2221[d][2]; *Wolf v Rodriguez*, 7 Misc3d 1022[A], 801 NYS2d 244 [2005]) nor include new legal theories not advanced on the original motion (*Wagner Davis, P.C. v Finkelstein*, 11 Misc3d 1054[A], 815 NYS2d 496 [2006]).

The petitioner contends on reargument that the evidence tendered by the respondents in support of their motion to dismiss pursuant to CPLR 3211[a][1] did not, as the court previously determined, "conclusively" demonstrate that it was the intent of the drafters of the Comprehensive Plan to eliminate the Business CR zoning for the commercial node in which the petitioner's property is located. The petitioner argues that the Draft Generic Environmental Impact Statement for the Comprehensive Plan (DGEIS), on which the respondents primarily relied, constitutes only one document and is focused merely on environmental issues and that the record submitted on the prior motion contains documentary evidence, other than the DGEIS cited by the court, which demonstrates that it was not the intent of the drafters of the Comprehensive Plan to eliminate the Business CR zoning. The petitioner contends on its motion to renew that the memorandum decision of the Hon. Sandra L. Sgroi, J.S.C., requires denial of

¹ The petitioner's previous motion for summary judgment asserted as a "cross motion" in its opposition papers was denied.

the respondents' motion to dismiss the petitioner's contention that Resolution 1089 did not conform to the provisions of the Comprehensive Plan.

Turning to that part of the petitioner's motion for leave to reargue, the respondents' attorney, Mary Hartill, averred in the respondents' sur-reply affirmation submitted in support of their underlying motion, that the Town Board's determination to prepare the DGEIS was consistent with the Staff Report, dated December 3, 2003. That Staff Report, also submitted in support of the sur-reply and prepared with respect to the petitioner's site plan application, states in relevant part: "The lot is shown in the Comprehensive Plan as remaining in the Business CR district for the first 400ft. off the Sound Ave. frontage with the small northerly remnant changing from Residence C to Residence AB-80" (Sur-Reply Affirmation, Exhibit B, STAFF REPORT, page 1). The Staff Report further states: "The updated Comprehensive Plan places the vast majority of the lot within the same Business CR zone. The remainder is Residence AB-80" and "The retail (wet or dry store) and restaurant uses are both permitted in the CR zone at present and are *preferred land uses in the Comprehensive Plan*" (Sur-Reply Affirmation, Exhibit B, STAFF REPORT, page 2, [emphasis added]). The respondents also submitted in support of the sur-reply affirmation a copy of Resolution 674 of the Riverhead Town Board which states in part that "the Comprehensive Plan has recommended that the subject properties retain their business and residential zoning...." (Sur-Reply Affirmation, Exhibit B, Town of Riverhead Resolution #674, page 1).

The respondents continue to argue that the language of the DGEIS supports their position. Furthermore, the respondents' attorney during oral argument noted that Resolution 1089 was the subject of public hearings prior to its adoption. One speaker at the public hearing held on October 19, 2004 did opine that the Comprehensive Plan contained no specific guidelines for use of the petitioner's property as commercial property as it did with other commercial property and that had the framers of the Comprehensive Plan intended to retain this property in a commercial zone they would have recommended a less intense commercial use. While relevant to the issue, sub judice, this opinion is speculative with little evidentiary weight (*Kontogiannis v Fritts*, 131 AD2d 944, 516 NYS2d 536 [1987]; *Fina Homes Inc. v Beckel*, 212 NYS2d 635 [1961]).

This conflicting documentary evidence fails to resolve all factual issues and to conclusively establish that it was the intent of the drafters of the Comprehensive Plan to eliminate the Business CR zoning for the commercial node in which the petitioner's property is located (*Martin v New York Hospital Medical Center of Queens*, 34 AD3d 650, 826 NYS2d 85 [2006]; *Wright v Evanston Insurance Company*, 14 AD3d 505, 788 NYS2d 416 [2005]). Accordingly, the petitioner's motion for leave to reargue is granted and upon reargument that part of respondents' motion which was previously granted in its order dated December 29, 2005 is now denied. That part of the petitioner's motion which is for leave to renew is denied as moot.

The respondents support their cross motion to reargue with, inter alia, their attorney's affirmation, a full copy of the DGEIS and a full copy of the Findings Statement for the Comprehensive Plan (Findings Statement). The respondents did not, however, submit proof of service of the cross

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motion. The respondents contend on this cross motion that the Court should now, based on the full copies of the DGEIS and the Findings Statement, dismiss the petitioner's contention that Resolution 1089 should be annulled on the ground that the respondents' failure to prepare an environmental impact statement violated the New York State Environmental Quality Review Act (SEQRA)²

The respondents' cross motion is denied on several grounds. Since the respondents have failed to submit proof of service of the cross motion, it cannot be determined if the respondents' motion for leave to "reargue" was timely made pursuant to CPLR 2221[d][3]. Secondly, although the respondents have denominated the cross motion as one for reargument, their motion is not based on an allegation that this Court overlooked a matter of fact or law in reaching its prior determination (*see*, CPLR 2221[d][2]) but rather that the Court, based on newly submitted information³, should alter its prior determination. Since this Court is constrained to construe this motion as one to renew (*see*, CPLR 2221[e][2]), the respondents must tender reasonable justification for their failure to present this documentation on the prior motion (CPLR 2221[e][3]); *Renna v Gullo*, 19 AD3d 472, 797 NYS2d 115 [2005]). The respondents failed to offer any justification in their cross motion. Furthermore, respondents' counsel's conclusory and unsubstantiated explanation on oral argument that "For some reason" his office failed to include a full copy of the documentation in the original motion papers does not constitute reasonable justification (*Greene v New York City Housing Authority*, 283 AD2d 458, 724 NYS2d 631 [2001]; *Cole-Hatchard v Grand Union*, 270 AD2d 447, 705 NYS2d 605 [2000]) and warrants denial of the respondents' cross motion for leave to "reargue".

Dated: _____

3/7/7



EDWARD D BURKE A. J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION

² The respondents' attorney did not address the petitioner's remaining contention that the Town Board of Riverhead (Board) failed to refer Resolution 1089 to the Suffolk County Planning Commission.

³ The respondents have now submitted full copies of the DGEIS and Findings Statement.