

**Town of Islip v Modica Assoc. of N.Y. 122 LLC**

2007 NY Slip Op 30778(U)

April 2, 2007

Supreme Court, Suffolk County

Docket Number: 0015650/2006

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

**HON. JEFFREY ARLEN SPINNER**  
Justice of the Supreme Court

**COPY**

<p><b>TOWN OF ISLIP,</b></p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">- against -</p> <p><b>MODICA ASSOCIATES OF NY 122 LLC, ATLANTIC CAPITAL PARTNERS INC. and COIN CASTLE CASINO LINES, INC.,</b></p> <p style="text-align: right;">Defendants.</p>	
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INDEX NO.:	<b>2006-15650</b>
MOTION SEQ. NO.:	002 - MD
ORIG. MOTION DATE:	08/23/06
MOTION SEQ. NO.:	003 - Mot D
ORIG. MOTION DATE:	08/30/06
MOTION SEQ. NO.:	004 - MG
ORIG. MOTION DATE:	01/03/07
FINAL SUBMIT DATE:	01/03/07

UPON the following papers numbered 1 to 149 read on these Motions:

- Plaintiff's Order to Show Cause (002) & Supporting Papers (Pages 1-32 & Exhibits A-I);
- Defendants' Opposition (Pages 33-64 & Exhibits A & A-B);
- Plaintiff's Motion (003) & Supporting Papers (Pages 65-90 & Exhibits A-F);
- Defendants' Opposition (Pages 91-116);
- Plaintiff's Reply (Pages 117-138);
- FISHER EGAN & GOLDEN's Order to Show Cause (004) & Supporting Papers (Pages 139-149 & Exhibit A)

it is,

**ORDERED**, that the first application of Plaintiff (002) is hereby denied in all respects, and the second application of Plaintiff (003) is hereby granted solely to the limited extend set forth herein below, and the unopposed application of FISHER EGAN & GOLDEN (004) is hereby granted in all respects.

Plaintiff first moves this Court (002) for an Order granting Plaintiff's combined Motion, pursuant to CPLR 2221(f), seeking leave to renew and leave to reargue Plaintiff's prior Motion for preliminary injunction, which sought as follows:

An Order enjoining and restraining Defendants, their agents, servants and employees, and all persons acting in concert with them, from:

1. Using and/or occupying the premises located at 122 Ocean Avenue (also known as 8 Bayview Avenue), Bay Shore, Town of Islip, New York, Suffolk County Tap Map # 442.00-01.00-049.003, in any manner other than as permitted by the applicable Code of the Town of Islip, and the most recently issued Building Division Certificate of Occupancy;
2. Specifically, using or occupying said premises to dock the vessel "Southern Elegance" and/or embark and disembark passengers to said vessel, upon the grounds that any such usage or occupation:

- a. Violates Islip Town Code §§ 68-25(A) and 68-303; and
- b. creates a continuing risk of environmental harm to the waters and bay bottom within the general vicinity of the subject premises;

and upon renewal and reargument, granting a preliminary injunction, or alternatively, ordering a new hearing to be conducted upon said application for a preliminary injunction.

Plaintiff second moves this Court (003) for an Order:

1. Pursuant to CPLR 3211(b), dismissing the First Affirmative Defense of Defendant MODICA ASSOCIATES contained in its Verified Answer with Counterclaims, and the identical First<sup>A</sup>ffirmative Defense of Defendants ATLANTIC CAPITAL and COIN CASTLE, contained in their Verified<sup>A</sup>nswer with Counterclaims, upon the ground that such Affirmative Defense has no merit;
2. Pursuant to CPLR 3211(a) (2) and/or (7), dismissing Defendant MODICA ASSOCIATES' First Counterclaim upon the grounds that the Court lacks subject matter jurisdiction of such Counterclaim and/or such Counterclaims fail to state a cause of action;
3. Pursuant to CPLR 3211(a)(7), dismissing all other Counterclaims asserted by Defendants upon the grounds that such Counterclaims fail to state a cause of action.

FISHER EGAN & GOLDEN moves this Court (004) for an Order, pursuant to CPLR 321(b)(2), permitting said law firm to withdraw as Attorneys for Defendants ATLANTIC CAPITAL and COIN CASTLE, and further directing that there be a stay of all proceedings for 30 days from the date of the Court's determination of this Motion to afford said Defendants sufficient time to retain a new Attorney.

As to that portion of Plaintiff's first application, regarding renewal, it is well settled that an application to renew must be based on additional material facts which were in existence at the time the prior motion was made, but were not then known to the party moving for leave to renew; and that said party must offer a valid excuse for not supplying such additional material facts. Such a request should be rejected where the moving party fails to offer the requisite reasonable excuse. (See, *Cuccia v City of New York*, 306 AD2d 2 [1 Dpt 2003] citing CPLR 2221(3); *Elson v Defren*, 283 AD2d 109 [1 Dpt 2001]; *Tishman Const Corp v City of New York*, 280 AD2d 374 [1 Dpt 2001]; *Linden v Moskowitz*, 294 AD2d 114 [1 Dpt 2002]; *Chelsea Piers Management v Forest Electric Corp*, 281 AD2d 252 [1 Dpt 2001]; *Matter of Creole Enterprises v Giuliani*, 240 AD2d 279 [1 Dpt 1997]). The Court finds that the moving party herein has failed to provide a reasonable explanation for failing to provide the information now offered herein as new. Further, in order to succeed, the moving party must demonstrate that the new facts not offered on the prior motion would change the previous determination rendered (See, *Greene v NYCHA*, 283 AD2d 458 [2 Dpt 2001]). The Court finds that the new facts offered would not have resulted in a different decision in the within matter. Therefore, leave to renew is hereby denied.

As to that portion of Plaintiff's first application, regarding reargument, it is well settled that such a motion is addressed to the discretion of the Court, affording the moving party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law, and not to afford an opportunity to argue once more the same questions previously decided (See, *Foley v Roche*, 68 AD2d 558 [1 Dpt 1979]). As stated by Counsel for Defendant MODICA ASSOCIATES, this Court did not dismiss the underlying Complaint, and was well aware it was deciding a request for preliminary injunction, not a request for permanent injunction. Based on that premise, the Court was justified in being loathe to grant the ultimate relief sought by Plaintiff under the guise of preliminary

injunction (*See, City of New York v Times' Up, Inc*, 11 Misc3d 1052, 2006 WL 346491\*3 [SupCt, New York Co, 2006], *citing, Sports Channel Am Assocs v Nat'l Hockey League*, 186 AD2d 417 [1 Dpt 1992]; *Rosa Hair Stylist Inc v Jaber Food Corp*, 218 AD2d 793 [2 Dpt 1995]). The Court found nothing to support Defendant's request for relief herein, and stands fully by its prior decision. Therefore, leave to reargue is hereby denied.

As to that portion of Plaintiff's second application, regarding the Affirmative Defense of *res judicata*, the Court concurs that such Affirmative Defense lacks merit, and should be dismissed.

As to that portion of Plaintiff's second application, regarding dismissal of Defendants' Counterclaims, the Court notes the following:

- A. When reviewing a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the allegations contained in the complaint are deemed to be true, deeming the pleadings to allege whatever may be implied from its statements by reasonable intendment, and the Court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint, without expressing its opinion regarding pleader's ultimate ability to establish the truth of the allegations before the trier of the facts (*See, Johnson v Kings County District Attorney's Office*, 308 AD2d 278 [2 Dpt 2003] *citing, Campaign for Fiscal Equity v State of New York*, 86 NY2d 307 [1995]; *Shayne v Julien Schlesinger & Finz, PC*, 110 AD2d 761 [1985] *citing, Underpinning & Foundation Contractors, Inc v Chase Manhattan Bank*, 46 NY2d 459 [1979]).
- B. When reviewing the requirement of exhaustion of administrative remedies, where pleader seeks to establish that it is entitled, as a matter of right, to be granted judgment declaring unconstitutional a threatened invasion of their property rights, there is no need to exhaust administrative remedies before commencing a declaratory judgment action (*See, Polak v Kavanah*, 48 AD2d 480 [2 Dpt 1975], *citing, Matter of Golden v Planning Bd of Town of Ramapo*, 30 NY2d 359 [1972], *Scarsdale Supply Co v Village of Scarsdale*, 8 NY2d 325 [1960]; *Dowsey v Village of Kensington*, 257 NY 221 [1931]; *Ulmer Park Realty Co v City of New York*, 267 AD 291 [1943]; Anderson, New York Zoning Law and Practice (2d ed), s 21.10, pp 182-183.

The Court concurs with Defendants in that, affording their pleadings all favorable inferences, they have asserted valid Counterclaims. Furthermore, pursuant to their Counterclaim for declaratory judgment, they are not required to exhaust administrative remedies, especially given the positions expressed by Plaintiff making it clear such an endeavor would result in rejection of such an application.

Without further comment, the Court has determined that FISHER EGAN & GOLDEN have made a valid case for the granting of the relief they request herein to be relieved as Counsel for Defendants ATLANTIC CAPITAL and COIN CASTLE, staying all proceedings herein as set forth herein below.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

**ORDERED**, that the first application of Plaintiff (002) for an Order granting Plaintiff's combined Motion, pursuant to CPLR 2221(f), seeking leave to renew and leave to reargue Plaintiff's prior Motion for preliminary injunction, which sought as follows:

An Order enjoining and restraining Defendants, their agents, servants and employees, and all persons acting in concert with them, from:

1. Using and/or occupying the premises located at 122 Ocean Avenue (also known as 8 Bayview Avenue), Bay Shore, Town of Islip, New York, Suffolk County Tap Map # 442.00-01.00-049.003, in any manner other than as permitted by the applicable Code of the Town of Islip, and the most recently issued Building Division Certificate of Occupancy;
2. Specifically, using or occupying said premises to dock the vessel "Southern Elegance" and/or embark and disembark passengers to said vessel, upon the grounds that any such usage or occupation:
  - a. Violates Islip Town Code §§ 68-25(A) and 68-303; and
  - b. creates a continuing risk of environmental harm to the waters and bay bottom within the general vicinity of the subject premises;

and upon renewal and reargument, granting a preliminary injunction, or alternatively, ordering a new hearing to be conducted upon said application for a preliminary injunction, is hereby denied in all respects, and it is further

**ORDERED**, that the second application of Plaintiff (003) for an Order:

1. Pursuant to CPLR 3211(b), dismissing the First Affirmative Defense of Defendant MODICA ASSOCIATES contained in its Verified Answer with Counterclaims, and the identical First Affirmative Defense of Defendants ATLANTIC CAPITAL and COIN CASTLE, contained in their Verified Answer with Counterclaims, upon the ground that such Affirmative Defense has no merit;
2. Pursuant to CPLR 3211(a) (2) and/or (7), dismissing Defendant MODICA ASSOCIATES' First Counterclaim upon the grounds that the Court lacks subject matter jurisdiction of such Counterclaim and/or such Counterclaims fail to state a cause of action;
3. Pursuant to CPLR 3211(a)(7), dismissing all other Counterclaims asserted by Defendants upon the grounds that such Counterclaims fail to state a cause of action;

is hereby granted solely to the extent that the First Affirmative Defense referenced herein above at (1) is hereby, and the relief sought in (2) and (3) is hereby denied in all respects, said Counterclaims not being dismissed hereby; and it is further

**ORDERED** that the unopposed application of FISHER EGAN & GOLDEN (004) for an Order, pursuant to CPLR 321(b)(2), permitting said law firm to withdraw as Attorneys for Defendants ATLANTIC CAPITAL and COIN CASTLE, and further directing that there be a stay of all proceedings for 30 days from the date of the Court's determination of this Motion to afford said Defendants sufficient time to retain a new Attorney, is hereby granted in all respects; and it is further

**ORDERED** that all proceedings herein are stayed for 30 days from the date of service of a copy of this Order, with Notice of Entry, by Counsel for Defendant MODICA ASSOCIATES upon all parties, herein and upon the Calendar Clerk of this Court within 20 days of the date this order is entered by the Suffolk County Clerk.

**Dated:** Riverhead, New York  
April 2, 2007

  
HON. JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

**TO:**

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