

Mazzanobile v Town of Southold

2007 NY Slip Op 32307(U)

July 25, 2007

Supreme Court, Suffolk County

Docket Number: 0030809/2006

Judge: Melvyn Tanenbaum

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

001 CASE DISP

PRESENT:
Hon. MELVYN TANENBAUM
Justice

~~001 MOT D~~
MOTION #~~002~~ CASE DISP
R/D: 021507
S/D: 041307

002 MOT D

GREGORY MAZZANOBILO, BEATRICE MAZZANOBILO,
CONSTANTINE P. GEORGIPOULOS and HARRIET
GEORGIPOULOS.

PLTF'S/PET'S ATTY:
ESSEKS, HEFTER & ANGEL ESQS.
108 East Main Street, POB 279
Riverhead, New York 11901

Plaintiff,

- against -

TOWN OF SOUTHDOLD and BOARD OF TOWN TRUSTEES,
TOWN OF SOUTHDOLD, Suffolk County, New York

DEFT'S/RESP'S ATTY:
AHMUTY, DEMERS & MCMANUS, ESQS
200 I.U. Willets Road
Albertson, New York 11507

Defendants.

Upon the following papers numbered 1 to 1 5 read on this motion for an order pursuant to CPLR § 3211 (a) (7)

Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers _____
Answering Affidavits and supporting papers 9-13 Replying Affidavits and supporting papers 14-15
Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants TOWN OF SOUTHDOLD and BOARD OF TRUSTEES, TOWN OF SOUTHDOLD ("BOARD") seeking an order pursuant to CPLR Section 3211 (a) (7) dismissing plaintiffs' complaint for failure to state a viable cause of action and the cross motion by plaintiffs GREGORY MAZZANOBILO, BEATRICE MAZZANOBILO ("MAZZANOBILES") and CONSTANTINE GEORGIPOULOS, HARRIET GEORGIPOULOS ("GEORGIPOULOSs") seeking an order staying defendants application until a determination is made by the Appellate Division, Second Department with respect to plaintiffs' related CPLR Article 78 petition are determined as follows:

Plaintiffs "MAZZANOBILES" are the contract vendees of two parcels measuring approximately 1.84 acres in Southold. Plaintiffs application for a building permit to construct a single family dwelling on the environmentally sensitive lots which contain wetlands and cranberry bogs was granted by the defendant "BOARD" on September 25, 2002 subject to approval by the New York State Department of Environmental Conservation ("NYSDEC") and the Suffolk County Department of Health Services ("SCDHS"). On July 27, 2004 the "BOARD" granted plaintiffs a one year extension of the building permit. Six days later "NYSDEC" granted a freshwater wetlands permit subject to conditions which modified the original Town permit

On September 29, 2004 plaintiffs re-submitted their permit application to the "BOARD" seeking a permit amendment to incorporate "NYSDEC's" modifications. The "BOARD" convened a public hearing in January, 2005 and directed a Town employed environmental technician to prepare a report. On April 20, 2005 the "BOARD" denied plaintiffs amended permit application and revoked the original permit. Plaintiffs commenced a CPLR Article 78 Petition seeking a judgment annulling the "BOARD's" April 20, 2005 decision. By short form Order and Judgment dated July 6, 2006 plaintiffs application was granted to the extent that the Court directed that the "BOARD" issue the amended permit. Defendants appeal of that Order and Judgment is presently pending.

In October, 2006 plaintiffs commenced this 42 U.S.C. Section 1983 action against the Town claiming violations of their substantive and procedural due process rights based upon the defendants wrongful revocation of the building permit. Defendants motion seeks an order dismissing the complaint claiming no valid cause of action is stated against the Town. Plaintiffs' cross motion seeks an order staying defendants application until a decision is rendered by the Appellate Division, Second Department in the related CPLR Article 78 proceeding.

In support of the motion defendants submit two affirmations of counsel and claim that plaintiffs have no valid due process claims to assert against the Town since plaintiffs have no cognizable property interest in the original permit. Defendants contend that the law requires that plaintiffs must have made substantial changes in the land and must have incurred substantial expenses in making those changes to acquire vested rights in the permit. Defendants maintain that since "NYSDEC's" permit required modifications to the Town issued permit, the original permit had to be amended and plaintiffs could not have acquired a vested right to build the proposed dwelling. Defendants also claim that plaintiffs have not yet made any physical changes to the land and have not incurred substantial expenses and therefore no vested rights have been acquired (citing the Court of Appeals decision in Town of Orangetown v. Magee, 88NY2d 41, 643 NYS2d 21 (1996)). Defendants claim that plaintiffs can not show that the "BOARD's" revocation was "wholly without legal justification" which is the second required element of a substantive due process claim. It is defendants position that plaintiffs' contention that the Town's actions were the result of community opposition and environmental concerns is insufficient to establish the required element of action taken which is "wholly without legal justification". Defendants contend that the Town's decision to deny the amended permit application and revoke the original permit was entirely proper and based upon legitimate, environmental interests. Defendants also claim that none of the plaintiffs have standing to bring this action since the "GEORGIPOULOSES" were not recipients of the original permit and since the "MAZZANOBILES" were not the record owners of the land and cannot therefore establish a cognizable property interest in the land. Defendants assert that plaintiffs have also failed to state a viable cause of action for deprivation of substantive due process rights in the amended permit since the "BOARD" retained discretion to deny issuing the amended permit based upon the revised plans.

Defendants argue that no procedural due process claims exist since plaintiffs had no cognizable property interest in the permit and since the CPLR Article 78 proceeding provided them with an adequate post-deprivation remedy. It is defendants position that plaintiffs claim essentially alleges that the "BOARD" committed a random, unauthorized act by revoking the permit and such conduct can be remedied pursuant to a CPLR Article 78 proceeding. Defendants contend that plaintiffs cannot state a cause of action for a violation of procedural due process since they have already obtained an adequate, meaningful post-

deprivation remedy in the form of a CPLR Article 78 proceeding. Finally defendants claim that there is no basis for a stay of this application since the issues submitted can be resolved without resort to further delay.

In opposition and in support of the cross motion plaintiffs submit an attorney's affidavit, an affidavit from an owner of a permit consulting expediting service and an affidavit from plaintiff GREGORY MAZZANOBILO and claim that viable causes of action are stated in the complaint for violations of plaintiffs procedural and substantive due process rights based upon the "BOARD's" alleged improper actions in denying the amended permit and revoking the original permit. Plaintiffs claim they have acquired a vested right in the permit based upon substantial changes made in reliance of the issuance of the permit and substantial expenses invested in the project. Plaintiffs claim to have expended substantial sums of money (\$34,000) to develop the property and that investments were substantial in relation to construction of a single family home. Plaintiffs contend that the "BOARD" had no reasonable basis to deny the amended permit application since the "NYSDEC" permit scaled back the original permit issued by the Town and plaintiffs therefore had a cognizable property interest in the permit. Plaintiffs claim that the "BOARD's" denial and revocation was "wholly without justification" since there was no legitimate reason for the decision. Plaintiffs also claim that viable procedural due process claims are stated since the actions complained of are claims based not upon random, unauthorized acts by state employees but were claims based on established state procedures which were knowingly disregarded by the defendants when the "BOARD" revoked plaintiffs permit and refused to grant the amendment without a hearing. Finally plaintiffs argue that a stay should be granted to adjourn defendants application to dismiss the complaint since the Appellate Division, Second Department has yet to rule on the appeal submitted by the defendants in the related CPLR Article 78 proceeding and if the defendants prevail plaintiffs will discontinue this action.

Standing is a threshold determination resting in part on policy considerations that a person should be allowed access to the courts to adjudicate the merits of a particular dispute (SOCIETY OF PLASTICS v. COUNTY OF SUFFOLK, 79 NY2 761, 570 NYS2d 778 (1991)). An aggrieved party must sustain an injury in fact—an actual legal stake in the matter being adjudicated—and the injury asserted must fall within the zone of interest sought to be promoted or protected by the statutory provision under which the agency has acted (SOCIETY OF PLASTICS v. COUNTY OF SUFFOLK , supra; SUN BRITE v. NORTH HEMPSTEAD ZONING BOARD, 69 NY2d 406, 515 NYS2d 418 (1987)).

The permit issued by the "BOARD" was granted to plaintiffs "MAZZANOBILES" who were the contract vendees of the property. Under these circumstances the "MAZZANOBILES" clearly have standing to commence this action. Defendants motion to dismiss the complaint as to the plaintiffs "GEORGIPOULOSs" must however be denied since the "GEORGIPOULOSs" although not named as applicants for the original building permit or the amended permit application as a matter of law as owners of the property have a vested right in such permits.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

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42 USC Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State..... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Municipalities are “persons” subject to suit under Section 1983 for the deprivation of constitutionally protected rights caused by actions which “implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by its officers (Monell v. New York City Dept. of Social Services 436 US 658, 690 (1978)). To succeed on a claim for damages under 42 USC Section 1983 plaintiffs must establish: 1) the deprivation of a protectable property interest; 2) by one acting under the authority of law.


In New York, a vested right in a building permit can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further development (Town of Orangetown v. Magee, 88 NY 2d 41, 47, 643 NYS2d 21 (1996)). “Neither the issuance of a permit (citations omitted) nor the landowner’s substantial improvements and expenditures, standing alone will establish the right. The landowner’s actions relying on a valid permit must be so substantial that the municipal action results in serious loss rendering the improvements essentially valueless.” (Magee at 47-48).

Plaintiffs “MAZZANOBILES” have failed to establish that they have a cognizable property interest in the permit and the amended permit since there is insufficient proof submitted to show substantial changes in the land and substantial expenses in making those changes. Plaintiffs cannot establish a vested right in the permit and no viable cause of action is therefore stated against the defendants for violations of plaintiffs substantive and procedural due process rights pursuant to 42 USC Section 1983 (See Town of Orangetown v. Magee, supra; Bower Associates v. Town of Pleasant Valley, 2 NY 3d 617, 781 NYS 2d 240 (2004)). Accordingly it is

ORDERED that plaintiffs cross motion for an order granting a stay on the pending motion is denied., and it is further

ORDERED that defendants motion for an order pursuant to CPLR Section 3211 (a)(7) dismissing plaintiffs complaint is granted. The complaint is hereby dismissed.

Dated: July 25, 2007


J.S.C.