SHORT FORM ORDER

INDEX No. 06-23694

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/3/06 (#001)
MOTION DATE 12/20/06 (#002)
ADJ. DATES 2/2/07
Mot. Seq. # 001 - Mot D
Mot. Seq. # 002 - Mot D

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| In the Matter of the Application of NICHOLAS ALIANO,<br><br>Petitioner,<br><br>For an Order pursuant to Article 78 of the Civil Practice law and Rules<br><br>-against-<br><br>RUTH D. OLIVA, Chairwoman, GERALD P. GOEHRINGER, JAMES DINIZIO, JR., MICHAEL A. SIMON and LESLIE KANES WEISMAN, constituting the ZONING BOARD OF APPEALS OF THE TOWN OF SOUTHOLD and the TOWN OF SOUTHOLD,<br><br>Respondents. | SCHEYER & JELLENIK, ESQS.<br>Attys. For Petitioner<br>110 Lake Ave. So.<br>Nesconset, NY 11767<br><br>SMITH, FINKELSTEIN, LUNDBERG<br>Attys. For Respondents<br>456 Griffing Ave.<br>Riverhead, NY 11901 |

Upon the following papers numbered 1 to 23 read on this amended Article 78 petition and motion to dismiss; Amended Petition and supporting papers 1-6; Notice of Motion/Order to Show Cause and supporting papers 7-10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 17-18; 19-21; Other Notice of Petition 11-16; Exhibits 22-23; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this amended petition (#001) for a judgment pursuant to CPLR Article 78 seeking, among other things, an Order directing: (1) that petitioner is entitled to the reinstatement of a building permit having established a vested right in the construction of a single family dwelling; (2) that the Building Department of the Town of Southold and the Town of Southold violated petitioner's civil rights pursuant § 1983 of the USCA by issuing a stop work order; (3) that the actions of the Building Department of the Town of Southold and the Town of Southold were arbitrary and capricious; (4) that this matter is ripe for review; (5) that the Town of Southold be prevented from stopping petitioner's continued construction under the filed building plans; (6) that the actions of the Town of Southold violated petitioner's procedural due process under the Fourteenth Amendment of the Constitution of the United States; (7) that the Zoning Board

of Appeals of the Town of Southold violated the Open Meetings Law of the State of New York; (8) that the deprivation of petitioner's constitutionally protected rights was officially adopted and promulgated by municipal officers; and (9) that the Town of Southold's actions were arbitrary, irrational and destructive of petitioner's cognizable property interests, is granted only to the extent pending a determination by the Court regarding that branch of the petition that the Zoning Board of the Town of Southold violated the Open Meetings Law of the State of New York; that the deprivation of petitioner's constitutionally protected rights were officially adopted and promulgated by municipal officers shall be held in abeyance pending the submission of the respondents verified answer and return and in all other respects, is denied; and it is further

***ORDERED*** that this motion (#002) by respondents seeking an Order pursuant to CPLR 7804(f) dismissing the petition as same is barred by the statute of limitations and fails to state a cause of action, is granted to the extent that the portions of the petition seeking an Order that petitioner is entitled to the reinstatement of a building permit; that the Building Department of the Town of Southold and the Town of Southold violated petitioner's civil rights pursuant § 1983 of the USCA by issuing a stop work order; that the actions of the Building Department of the Town of Southold and the Town of Southold were arbitrary and capricious; that this matter is ripe for review; that the Town of Southold be prevented from stopping petitioner's continued construction under the filed building plans; that the Town of Southold's actions were arbitrary, irrational and destructive of petitioner's cognizable property interests; that the actions of the Town of Southold violated petitioner's procedural due process under the Fourteenth Amendment of the Constitution of the United States; and in all other respects, is denied; and it is further

***ORDERED*** that the respondents shall submit a verified answer and return within thirty (30) days of the date herein; and it is further

***ORDERED*** that the counsel for the petitioner and respondent shall each serve a copy of this Order with Notice of Entry upon respective counsel within twenty-five (25) days of the date herein pursuant to CPLR 2130(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court.

This Article 78 petition was brought by the petitioner upon the denial by the Southold Zoning Board of Appeals (hereinafter "Board") of his application for an area variance to construct a one family house with a full basement on a bluff overlooking the Long Island Sound. The building permit was issued by the Southold Town Board of Trustees (hereinafter "Trustees") on April 20, 2005. By January 5, 2006, petitioner had excavated the area and concrete footings and partial foundation walls were poured.

In his affidavit in support of the Article 78 petition, petitioner states that on the afternoon of January 5, 2006, the Town of Southold's Director of Code Enforcement, Edward Forester (hereinafter "Forester") appeared at the job site and conversed with his builder, John Dalton (hereinafter "Dalton"). Forester informed the builder that the Town of Southold (hereinafter "Town") issued the building permit by mistake; that the building being constructed was not set back far enough for the bluff; that the issuance of the permit by the Town had been a ministerial error; that he was going to issue an oral stop work order; that this issuance of the oral stop work order was contested by his agent at the job site who indicated that an oral stop work order was ineffective to stop work; and that a Building Department's employee called his agent at the job site and informed him that because the Town made a mistake in issuing the permit, a stop work order was being issued as Forester had stated.

Petitioner further states that at the time, the building construction was approved by the Department of Environmental Conservation; that he had permits from the Coastal Erosion Management, the Town's Waste Water Disposal and the Suffolk County Department of Health; that he acquired vested rights because construction had already begun and that he had valid permits; that in an attempt to cooperate with the Town in order to obtain the necessary variances, he was told that the Town would walk him through the variance application process; and that in that regard, he hired an attorney to apply for a variance for a relaxation of the set back requirement for the house from the bluff; that during this time period before the first meeting of the Board to hear his application, the chairperson of the Board came to the job site on an almost daily basis to state to Dalton that she was not going to allow anything to be built on the site and if it was, it would

be over her dead body. The petition is opposed by respondents who move pursuant to CPLR 7804(f) for an Order to dismiss the petition upon the objections in point of law that the petition is barred by the statute of limitations and fails to state a cause of action.

The first hearing before the Board was on March 30, 2006, then adjourned to April 27, 2006, May 25, 2006 and again to June 7, 2006. The parties stipulated that the Board would be granted additional time past the statutorily required date under Town Law § 267(a) to issue a decision regarding the variance application by petitioner.

The Appellate Division, Second Department has restated the rules governing a motion to dismiss in ***State of New York v Grecco,*** 21 AD3d 470, 800 NYS2d 214 [2d Dept 2005]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, plaintiff has stated a cause of action against one or more defendants (*see* ***Parsippany Constr. Co. Inc. v Clark Patterson Assoc., P.C.,*** ____ AD3d ____, ____ NYS2d ____ [2d Dept 2007]; ***Sirlin v Town of New Castle,*** 35 AD3d 713, 826 NYS2d 676 [2d Dept 2006]; ***Dunleavy v Hilton Hall Apts. Co., LLC***, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see* ***Fast Track Funding Corp. v Perrone,*** 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; ***Paterno v CYC, LLC,*** 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; ***McGee v City of Rensselaer,*** 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; ***Leon v Martinez,*** 84 NY2d 83, 614 NYS2d 972 [1994]; ***Morone v Morone,*** 50 NY2d 481, 429 NYS2d 592 [1980]; *see also* ***511 West 232nd Owners Corp. v Jennifer Realty Co.,*** 98 NY2d 144, 746 NYS2d 131 [2002]; ***Sokoloff v Harriman Estates Dev. Corp.,*** 96 NY2d 409, 729 NYS2d 425 [2000]).

Thus, a motion to dismiss for failure to state a claim may be granted only if it appears certain that under no possible circumstances would the plaintiff be entitled to relief (*see* ***Lipsky v Commonwealth United Corp.,*** 551 F.2d 887 [2d Cir 1976]). Even if it appears on the face of the pleadings that recovery is very remote, the petition will withstand the motion to dismiss as long the petitioner retains a possibility of success (*see* ***Scheuer v Rhodes,*** 416 U.S 232, 94 S. Ct. 1683, 40 L. Ed 90 [1974]).

On January 5, 2006, through his employees on the job site, petitioner was verbally informed that the Town was issuing a stop work order based upon a building permit erroneously issued for the job site. A copy of the stop work order was also nailed to a tree on the property (*see* affd Thomas W. Cramer January 22, 2007) and mailed on January 5, 2007 to the address listed on the tax bills for the subject property, which tax bills was subsequently questioned by Aliano. Therefore, petitioner had notice of the stop work order.

A challenge to a public official's act is governed by a four-month statute of limitations (CPRL 217), which in this case, was that an appeal had to be taken on or before May 6, 2007. Petitioner's various claims for affirmative relief based upon his allegation that he had a vested right is without merit because of his failure, as an aggrieved party, to timely assert a claim in order to preserve that claim for judicial review. Statutes of limitation are not to be disregarded by courts out of a vague sympathy for particular litigants (*see* ***Carey v International Bhd. of Elec. Workers Local Pension Plan,*** 201 F.3d 44 [2d Cir 1999]); nor are they open to discretionary changes (*see* ***Arnold v Mayal Realty Co.***, 299 NY 57 [1949]). The statute of limitations generally begins to run at the time the cause of action accrues and generally runs without interruption, notwithstanding any present or subsequent disadvantage which a party is laboring in the prosecution of the action (*see* 2B Carmody Wait 2d §§ 13:210, 13: 332 ). Otherwise, the claim is deemed waived and the courts will be precluded from considering the claim in an Article 78 proceeding under the doctrine of exhaustion of administrative remedies, which, in the zoning context, requires a party to take an appeal from an adverse zoning decision or interpretation to the zoning board of appeals (*see* CPLR 7803;

Town Law § 267-a[4]; ***Hays v Walrath,*** 271 AD2d 744, 705 NYS2d 441 [3d Dept 2000]; ***Miller v Price,*** 267 AD2d 363, 700 NYS2d 209 [2d Dept 1999]; ***Nautilus Landowners Corp. v Harbor Commn.,*** 232 AD2d 418, 648 NYS2d 627 [2d Dept 1996]; *see e.g.* ***Buffolino v Board of Zoning & Appeals of Inc. Vil. of Westbury,*** 230 AD2d 794, 646 NYS2d 179 [2d Dept 1996]; *see also e.g.* ***Trident Realty L.P. v Planning Bd. of Inc. Vil. of East Hampton,*** 248 AD2d 545, 669 NYS2d 873 [2d Dept 1998]; *lv app den* 92 NY2d 812, 680 NYS2d 905 [1998]).

Petitioner never exhausted his administrative remedies by taking a timely administrative appeal to the Board from the Town's issuance of a stop work order as required in order to bring an action under Article 78 (*see* ***Young Men's Christian Assn. v Rochester Pure Waters Dist.,*** 37 NY2d 371, 372 NYS2d 633 [1975]; 12A Carmody-Wait 2d § 78:54; 2 N.Y. Zoning Law & Prac. § 28:06). Under New York law "one who objects to the act of an administrative agency must exhaust administrative remedies before being permitted to litigate in a court of law" (***Watergate II Apts. v Buffalo Sewer Auth.,*** 46 NY2d 52, 574 NYS2d 821 [1978] *citation omitted*; ***Matter of Jordan's Partners v Goehringer,*** 204 AD2d 453, 611 NYS2d 626 [2d Dept 1994]; ***Matter of Padar Realty Co. v Klein,*** 60 AD2d 533, 400 NYS2d 46 [1st Dept 1977], *accord* ***Welch v New York State Div. of Hous. & Community Renewal,*** 287 AD2d 725, 732 NYS2d 68 [2d Dept 2001]). "The doctrine furthers the statutory goal of relieving the courts of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrators efforts to develop a co-ordinated, consistent and legally enforceable scheme of regulation" (***Watergate II Apts. v Buffalo Sewer Auth.,*** 46 NY2d 52, *supra* at 57) and the courts have manifested their unwillingness to become zoning boards of appeal (*see* ***Board of Managers v Village of Westhampton Bch.,*** 2000 WL 33911223 [EDNY 2000], *judgement affd.* 10 Fed Appx. 28 [2d Cir. N.Y. 2001]).

The Board is vested with the authority to review the decisions of the building inspector (*see* Town Law § 267 a[5]). Petitioner did not appeal the determination of the building department. Petitioner having failed to exhaust his administrative remedies, the issue of vested rights cannot be reviewed by this Court (*see* ***Engert v Phillips,*** 150 AD2d 752, 542 NYS2d 202 [2d Dept 1989]). Nor is the doctrine of equitable estoppel available to petitioner as a defense as petitioner was aware of the stop work order which was sufficient to place him under a duty to make an inquiry and ascertain all of the relative facts prior to the expiration of the statute of limitations (*see* ***Gleason v Spota,*** 194 AD2d 764, 599 NYS2d 297 [2d Dept 1993]; *see also* ***DeMille v Franklin Gen. Hosp.,*** 107 AD2d 656, 484 NYS2d 596 [2d Dept 1985]; *affd* 65 NY2d 728, 492 NYS2d 29 [1985]).

Furthermore, petitioner also failed to demonstrate that an appeal to the Board would be futile and be denied because of the Board's unwillingness to hear an appeal or consider and weigh the facts of the circumstances surrounding the issuance of the stop work order (*see* ***Miller v Price,*** 267 AD2d 363, *supra*; ***Segalla v Town of Amenia,*** 309 AD2d 742, 765 NYS2d 256 [2d Dept 2003]; ***Beyah v Scully,*** 143 AD2d 903, 533 NYS2d 515 [2d Dept 1988]; ***Pfalff v Columbia-Greene Community Coll.***, 99 AD2d 887, 472 NYS2d 480 [3d Dept 1984]) or that the Board did not have the power to overrule the decision of the Building Department.

Although there is a limited exception to the situation which permits a petitioner to circumvent the requirement for bringing a special proceeding pursuant to CPLR 7801 *et seq.* without exhausting all administrative remedies, where the challenge to state an action is based upon a claim of unconstitutionality, "this exception to the exhaustion rule is a limited one and the exception is 'itself subject to qualification'" (***Dozier v New York City,*** 130 AD2d 128, 519 NYS2d 135 [2d Dept 1987]; *see also* ***Fichera v City of New York,*** 145 AD2d 482, 535 NYS2d 434 [2d Dept 1988]). Where there exists factual issues that may be resolved by an administrative appeal, a petitioner may not circumvent the requirement that he exhaust all administrative remedies by merely asserting that there are constitutional issues (*see* ***Fichera v City of New York,*** 145 AD2d 482, *supra*; ***Dozier v New York City,*** 130 AD2d 128, *supra*).

Merely claiming a violation of due process or the inadequacy of a hearing, which is not the case

herein, is not sufficient to invoke the "constitutionality" exception. A petitioner claiming this type of constitutional violation is still required to exhaust all administrative remedies prior to commencing a special proceeding in Supreme Court (*see* ***Levine v Board of Educ. of the City of New York,*** 173 AD2d 619, 570 NYS2d 200 [2d Dept 1991]; ***Beyah v Scully,*** 143 AD2d 903, *supra*; ***Dozier v New York City,*** 130 AD2d 128, *supra*).

Petitioner was not denied due process because the Board was not required to grant him a hearing regarding the issuance of the stop work order. Further the right to a hearing at any given time and in any given situation is not one created by the Constitution but rather, is created and defined by either state or local law (*see* ***Cleveland Bd. of Educ. v Loudermille,*** 470 U.S. 532, 105 S.Ct. 1487, 84 L. Ed. 494 [1985]; ***Christopher v Phillips,*** 160 AD2d 1165, 554 NYS2d 370 [3d Dept 1990], *app den* 76 NY2d 706, 560 NYS2d 988 [1990]).

Petitioner's claim that he has acquired a "vested right" (*see* Lexstat 9-52D Zoning and Land Use Controls § 52D:02) in the permit is misplaced in light of the Building Department's power to issue a stop work order. The vested right doctrine only applies when a court has determined that a permit was revoked illegally, that is, there was no basis or authority in law for the work under the permit to be revoked (*see* ***In the Matter of Lawrence School Corp. v Morris,*** 167 AD2d 467, 562 NYS2d 707 [2d Dept 1990]). The "vested rights" doctrine is usually applied in a situation where a permit is revoked as the result of a zoning change, which takes place after the permit is issued under the previously existing zoning laws (*cf.* ***Town of Orangetown v Magee,*** 88 NY2d 41, 643 NYS2d 21 [1996]; ***Ellington Constr. Corp., v Zoning Board of Appeals of the Inc. Vil. of New Hempstead,*** 77 NY2d 114, 564 NYS2d 1001 [1990]; ***Reichenbach v Windward at Southampton,*** 80 Misc2d 1031, 364 NYS2d 283 [NY Sup. Ct. 1975], *judgment affd.* 48 AD2d 909, 372 NYS2d 985 [2d Dept 1975], *app dism* 38 NY2d 912, 383 NYS2d 757 [1976], *app dism* 38 NY2d 710, 382 NYS2d 1030 [1976]). The "vested right" doctrine is applied to prevent a grave loss where there is a change in the law such that the permit is no longer legal and cannot be used under the current law, or where the permit is revoked without any legal authority (*cf.* ***Town of Orangetown v Magee,*** 88 NY2d 41, *supra*; ***Ellington Constr. Corp. v Zoning Board of Appeals of the Inc. Vil. of New Hempstead,*** 77 NY2d 114, *supra*).

There is no question that there was statutory authority to issue the stop work order and there was a rational reason for the Building Department to issue the stop work order. Therefore, the "vested rights" doctrine is inapplicable. A permit for a use prohibited by a valid zoning ordinance, regulation or restriction is void and subject to revocation (*see* 8 McQuillin Mun. Copr. § 25:153 [ 3rd ed.). "A municipal permit issued illegally or in violation of the law or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and may be revoked notwithstanding that he may have acted on the permit; any expenditures made in reliance upon such permit is made at his peril" (***Commonwealth v Flynn,*** 21 Pa. Commonwealth 264, 269, 344 A. 2d 720 [Commonwealth Court of Pennsylvania 1975]; *see also* ***Lamar Adv. of Penn, LLC v Pitman,*** 9 AD3d 734, 780 NYS2d 233 [3d Dept 2004]; 12 N.Y. Jur. 2d Buildings § 62). Neither the issuance of a permit nor the landowner's substantial improvements and expenditures, standing alone, will establish the right (*see* ***Sterngass v Town Bd. of Clarkstown,*** 10 AD3d 343, 781 NYS2d 131 [2d Dept 2004] *citation omitted*). Thus, petitioner's claim of a "vested right" must be denied (*see* ***Village of Westhampton v Cayea,*** 38 AD3d 760, 835 NYS2d 582 [2d Dept 2007]).

Without a vested right, petitioner does not have a claim for violation of due process or a taking without compensation (*accord* ***Nicoklokis v Rotella,*** 24 AD3d 739, 806 NYS2d 700 [2d Dept 2005]; ***Apple Food Vendors Assoc. v City of New York,*** 168 Misc2d 483, 638 NYS2d 540 [Sup.Ct. New York County 1995], *affd* 228 AD2d 282, 644 NYS2d 216 [1st Dept 1996], *app dism* 88 NY2d 1064, 651 NYS2d 407 [1996], app den 89 NY2d 807, 655 NYS2d 887 [1997]). Therefore, that branch of the petition seeking a determination that the petitioner is entitled to the reinstatement of a building permit, having established a vested right in the construction of a single family dwelling; that the Southold Town Building Department and the Town of Southold violated petitioner's civil rights pursuant § 1983 of the USCA by issuing a stop

work order and indicating that there should be no further building under the issued work permit; that the actions by the Southold Town Building Department and the Town of Southold were arbitrary and capricious; that this matter is ripe for review; that the petitioner has established a protectable property interest exist in that petitioner had a vested right under state law to develop the property; that the Town of Southold had acted arbitrarily and capriciously in attempting to stop all work in attempting to have the petitioner appear before the Zone Board of Appeals of the Town of Southhold, which petitioner contends was a useless act; that the building permit be reinstated; that an injunction to prevent the Town of Southold from stopping the petitioner from continuing construction under the filed building plans; that the actions of the Town of Southold violated the Fourteenth Amendment of the Constitution of the United States in that the petitioner was denied procedural due process, is denied.

Furthermore, that branch of the petition seeking a declaration by the Court that the Town of Southold's actions were arbitrary, irrational and destructive of a cognizable property interest of the petitioner based upon the issuance of a stop work order, is also denied due to petitioner's failure to appeal the issuance of the stop work order pursuant to Town Law § 267- a(5).

The relief pursuant to CPLR 3014 and 3024, requested by the respondents, is denied as the Court is not empowered to grant such relief, the Court being precluded from granting any relief which is not contained in movant's "Notice of Motion" or, as here, movant's Order To Show Cause (*see* CPLR 2214; ***Northside Studios, Inc. v Treccagnoli,*** 262 AD2d 469, 692 NYS2d 161 [2d Dept 1999]; ***Arriaga v Michael Laub, Co.,*** 233 AD2d 244, 649 NYS2d 707 [1st Dept 1996]).

Accordingly, the petition and motion are decided as herein indicated. The respondents shall have thirty (30) days from the dated of this Order to submit a verified answer and return. This constitutes the Order and decision of the Court.

DATED: 6/10/07

THOMAS F. WHELAN, J.S.C.