

Matter of Yews, Inc. v Wright

2007 NY Slip Op 33059(U)

September 13, 2007

Supreme Court, Nassau County

Docket Number: 5140-07/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

In the Matter of the Application of

YEWS, INC.,

**for a Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules,**

Petitioner,

Index No. 05140/07

Motion Dated: 4/12/07

5/29/07

Motion Submitted: 6/21/07

Motion Sequence: 001, 002

-against-

**GERALD WRIGHT, ROBERT O'BRIEN,
WILLIAM WEITZMAN, DOUGLAS DIANA,
KATURIA D'AMATO, and DAVID WEISS,
in their official capacity as members of the
Board of Zoning Appeals of the Town of
Hempstead,**

Respondents.

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Under Motion Sequence 001, Petitioner moves this Court pursuant to Article 78 of the CPLR and Article 16, Section 267 of the Building Zone Ordinance of the Town of Hempstead, New York, for an Order reversing various use variances and area variances

granted with respect to property located at 433 Atlantic Avenue, Oceanside, New York, to Gaetana Pizzirusso (hereinafter "Pizzirusso") and/or remanding this matter to the Board of Zoning and Appeals for an explanation for its failure to follow its own precedent, which denied the same relief to the same party in 1997. Pizzirusso is the owner of the subject property. Pizzirusso resides at the subject location and operates a landscaping nursery from the premises.

Under Motion Sequence 002, Pizzirusso, not a party to the instant action, moves for an Order pursuant to Articles 10 and 78 of the CPLR, granting it the right to intervene as a Party Intervenor-Respondent for the sole purpose of making the instant motion to dismiss for failure to include Pizzirusso as a necessary party.

The Board of Zoning Appeals of the Town of Hempstead, the Respondents herein, do not offer any opposition to these applications.

In the instant matter, it is undisputed that the applicable Statute of Limitations, pursuant to Town Law § 267, to commence an action to include Pizzirusso, has expired. It is further undisputed that Pizzirusso has not been brought into this action. Petitioner argues that there was no need to bring Pizzirusso into the action as she and the Board of Zoning Appeals are united in interest. This Court disagrees. It cannot be said that Pizzirusso's and the Board of Zoning Appeals' interests in the subject matter of these variances are such that, "they stand or fall together and that judgment against one will similarly affect the other." (See *Mondello v. New York Blood Ctr. – Greater N.Y. Blood Program*, 80 N.Y.2d 219, 604 N.E.2d 81, 590 N.Y.S.2d 19 [1992]). If the decision of the Board of Zoning Appeals is reversed, which is, in part, the relief sought in the underlying Petition, Pizzirusso's use of her property will be affected. The fact that the Board of Zoning Appeals offered no opposition to Petitioner's application to reverse their decision, further supports the conclusion that the Board and Pizzirusso are not united in interest. It is noted, however, that although the interests of the Board and Pizzirusso are common and united to the extent that both have an interest in the validity of the granted variance and compliance with local laws, a judgment reversing the variances granted by the Board will have a different effect on Pizzirusso than the Board.

"A party whose interest may be adversely effected by a potential judgment must be made party in a CPLR article 78 proceeding." (*Matter of Karmel v. White Plains Common Council*, 284 A.D.2d 464, 465, 726 N.Y.S.2d 692 (2d Dept., 2001); see also *Matter of Jenkins v. Strough*, 303 A.D.2d 754, 756 N.Y.S.2d 867 [2d Dept., 2003]). Certainly, had permits been issued, the entity to which the permit was issued would be a necessary party

(Matter of New York City Audubon Society, Inc. v. New York State Department of Environmental Conservation, 262 A.D.2d 324, 691 N.Y.S.2d 562 [2nd Dept., 1999]).

Pizzirusso's application for leave to intervene as a Party Intervenor-Respondent for the sole purpose of making the instant motion to dismiss for failure to include her as a necessary party is granted.

Having determined that Pizzirusso is a necessary party and that the Statute of Limitations has expired, the Court must now examine whether justice requires the dismissal of this action or whether it can proceed. The intention of CPLR 1001(a) is to afford due process by providing the opportunity to be heard before one's rights are adversely affected. (*Matter of 27th St. Block Assn. v. Dormitory Auth. of State of N.Y.*, 302 A.D.2d 155, 752 N.Y.S.2d 277 [1st Dept., 2002]).

CPLR 1001(b) sets forth five factors to be considered by the Court in making the determination. Under the first factor, the Court finds that the Petitioner has no other effective remedy if this action were to be dismissed. Secondly, the Court shall consider the prejudice that may accrue from the nonjoinder to the defendant or to the person not joined. Herein, Petitioner argues that the permits have not been issued and thus if the matter is remanded Pizzirusso is in the same status she has been for the past ten years, therefore she will suffer no prejudice (See, *Leventhal v. Michaelis*, 29 Misc.2d 831, 219 N.Y.S.2d 508 [Sup.Ct., Nassau Co., 1961]), whereas if the proceeding is dismissed, the Petitioner and others will be adversely impacted because of the misinformation allegedly imparted to the Board with respect to the proximity of the property to a Church and school and the failure to follow the Board's own precedent without explanation. The third factor is whether and by whom the prejudice might have been avoided or may in the future be avoided. Clearly, Petitioner could have avoided any prejudice by naming Pizzirusso, a party known to it as an interested party, even if it did not believe her to be a necessary party. Likewise, Pizzirusso could avoid any prejudice by intervening for all purposes and participating in this proceeding, despite the fact that she is not required to do so. To the extent that Petitioner seeks remand to the Board, no protective provision in the order or judgment of the Court is necessary (CPLR1001(b)4; *Red Hook/Gowanus Chamber of Commerce v. New York City Board of Standards and Appeals*, 11 Misc.3d 1081(A), 816 N.Y.S.2d 700 (Sup Ct., Kings Co., 2006) on rem'd 5 N.Y.3d 452, 839 N.E.2d 878, 805 N.Y.S.2d 525 [2005]). No specific relief is being sought from Pizzirusso, thus this Court can remand the matter to the Board in the absence of Pizzirusso (CPLR 1001(b)5; *Matter of 27th St. Block Ass'n., supra*).

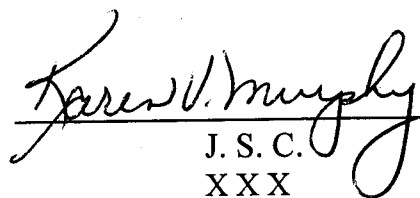
Additionally, the Court finds that while the statute of limitations has expired, Pizzirusso, is still subject to this Court's jurisdiction and may be joined as a party to this

proceeding. (See, *Redhook/Gowanus, supra; Matter of Romeo v. New York State Department of Education*, 41 A.D.3d 1102, 839 N.Y.S.2d 297 [3rd Dept., 2007]).

Under the circumstances presented herein, the Court in its discretion grants Petitioners request that this matter proceed in Pizzirusso's absence on the basis of the CPLR 1001(b) factors. Pizzirusso's motion to dismiss the Petition for failure to join a necessary party is denied. However, in light of the Board's lack of opposition to the Petition, the matter is remanded to the Board of Zoning Appeals of the Town of Hempstead for further proceedings consistent with the findings herein.

The foregoing constitutes the Order of this Court.

Dated: September 13, 2007
Mineola, N.Y.


J. S. C.
XXX

ENTERED

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