

Division St. Hotel Corp. v Village of Sag Harbor

2007 NY Slip Op 33479(U)

October 24, 2007

Supreme Court, Suffolk County

Docket Number: 0002417/2004

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 3-22-06; 4-11-07
SUBMITTED: 4-18-07
MOTION NO.: 005-MOT D
006-MOT D

DIVISION STREET HOTEL CORP., d/b/a THE
AMERICAN HOTEL, EUGENE DAMON, BIG FISH,
d/b/a SEN, DENMAR HOLDING CORP., DOCKSIDE
BAR & GRILL, HARBOR RESORTS INC., d/b/a
BARON'S COVE INN, PATRICK E. MALLOY III, SAG
HARBOR DESTINATION, INC., SAG HARBOR INN
CORP., THEODORE J. SEITER, ELIZABETH E.
SEITER, SAG HARBOR LAUNDERETTE, SALTAG,
INC., FRANK CANIGLIA, GUY & GIRL, INC., d/b/a
MAGNOLIA RESTAURANT, RUSSELL J. SMYTH,
SMYLOS INN LTD., d/b/a THE CORNER, JOSIL, INC.,
d/b/a WHALERS CLEANERS, and all others similarly,

Plaintiffs-Petitioners

HAMBURGER, MAXSON, YAFFE, WISHOD &
KNAUER, LLP
Attorneys for Plaintiffs-Petitioners
225 BroadHollow Road, Suite 301E
Melville, New York 11747

LAMB & BARNOSKY, LLP
Attorneys for Defendant-Respondent
534 BroadHollow Road, Suite 210
Melville, New York 11747

-against-

VILLAGE OF SAG HARBOR,

Defendant-Respondent.

X

Upon the following papers numbered 1 to 20 read on this motion for partial summary judgment ; Notice of Motion and supporting papers 1-10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-17 ; Replying Affidavits and supporting papers 18-19 ; Other 20 ; it is,

ORDERED that this motion by the defendant-respondent, Village of Sag Harbor, for partial summary judgment in its favor is granted to the extent indicated below; and it is further

ORDERED that, pursuant to CPLR 7804(f), any party may re-notice this matter for a hearing on the merits.

In 1976, the defendant-respondent, Village of Sag Harbor (hereinafter "the Village"), adopted a local law entitled the "Sanitary Sewer Law" establishing a sewerage system in the Village. The system serves only a small portion of the Village, the commercial section

concentrated along Main Street and a section of the waterfront. The Sanitary Sewer Law imposes a system of sewer rents on all using premises, i.e., those premises actually connected to the system, based on the sum of the basic unit charges and surcharges assigned to each premises. For example, a single family dwelling is assigned one unit and a hotel one-third of one unit per room. Restaurants are assigned surcharges based on the number of patrons. In addition, the Sanitary Sewer Law imposes a water use charge on all using premises based on the quantity of water consumed by each premises as reported by the Suffolk County Water Authority. The unit charge and the water use charge are determined by a resolution of the Village Board of Trustees, which remains in effect until superseded, amended, or repealed. Until 1995, the rate set by the Board of Trustees for the basic unit charge was \$125 per unit for both commercial and residential users. In 1995, the basic unit charge was raised to \$300 per unit for commercial users only. Between 1999 and 2001, the basic unit charge was \$130 per unit for residential users and \$350 per unit for commercial users. The number of units assigned to each category of use remained unchanged until 2002.

In 2001, the Board of Trustees commissioned a study of the sewerage system to update the classifications and make them more equitable. The study revealed that the unit structure was skewed in favor of water-intensive businesses, which paid less than their fair share of the costs. For example, offices and shops contributed more than 60% of the total revenue despite the fact that they used only 16% of the services. Restaurants, on the other hand, contributed only 16% of the total revenue, but used 29% of the services. After a series of public meetings in 2001 and 2002 and two public hearings in 2002, the Board of Trustees adopted an amendment to the Sanitary Sewer Law on June 11, 2002, which altered the number of sewer rent units assigned to some categories of use and created new categories of use for laundries, dry cleaners, and health clubs.

On September 3, 2002, the Board of Trustees met to consider the amounts to be charged for each unit and for water use based on the projected sewer budget for the fiscal year 2002-2003. The Board adopted a resolution setting the per-unit charge at \$175 for residential properties and \$1,250 for commercial properties and setting the water use charge at \$4.51 per thousand cubic feet of water (a decrease from \$5.72). Sewer rent statements reflecting the new rates were mailed in September 2002 for the fiscal year beginning on October 1, 2002, and ending on September 30, 2003. Those rates remained in effect until the 2005-2006 fiscal year, when there was a one-time reduction in the per-unit charge to \$115 for residential users and \$990 for commercial users due to a surplus in the sewer budget. The surplus was caused by inaccurate estimates of water use by the Suffolk County Water Authority. The per-unit charge reverted back to \$175 for residential properties and \$1,250 for commercial properties in the 2006-2007 fiscal year.

On January 29, 2004, the plaintiffs-petitioners, commercial users of the sewerage system in the Village of Sag Harbor, commenced this hybrid declaratory judgment action and CPLR article 78 proceeding against the Village, challenging the per-unit charge of \$1,250. They subsequently amended the complaint-petition, inter alia, to include all of the fiscal years from 2002-2003 through 2006-2007. The Village moves for partial summary judgment on statute-of-limitations grounds.

The plaintiffs-petitioners' first cause of action is for a judgment declaring that the sewerage system and the rate structure adopted by the Village to construct, finance, and maintain that system violates the State Constitution and Village Law § 14-1400 because (1) the Village had no statutory authority to create and maintain the system without the approval of the New York State Commissioner of Health, (2) the Village had no statutory authority to omit 90% of the Village from inclusion in the system, (3) the Village had no statutory authority to impose 100% of the costs of constructing, financing, and expanding the system on the 10% of the properties actually connected to the system, (4) the sewer rents imposed by the Village substantially exceed the revenues needed to operate and maintain the system, and (5) the sewer rents for the fiscal years 2002-2003 through 2006-2007 violate the Equal Protection Clause of the State Constitution by imposing a disproportionate and irrational burden on commercial properties, as opposed to residential properties, vacant properties, and those properties not connected to the system.

In order to determine the statute of limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief is sought (*see, New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 20-201; *Solnick v Whalen*, 49 NY2d 224, 229). If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action (*see, Matter of Save the Pine Bush v Planning Bd. of City of Albany*, 70 NY2d 193, 202; *Press v County of Monroe*, 50 NY2d 695, *Solnick v Whalen*, *supra* at 230). The time for asserting the claim cannot be extended through the simple expedient of denominating the action as one for declaratory relief (*see, New York City Health & Hosps. Corp. v McBarnette*, *supra* at 201). When, as here, the claim is one against a governmental body or officer, the question is whether the four-month statute of limitations applicable to CPLR article 78 proceedings should be invoked.

The plaintiffs-petitioners contend that the Village's adoption of the Sanitary Sewer Law violated Village Law § 14-1400, which requires the approval of the New York State Commissioner of Health to temporarily omit any portion of the Village from inclusion in the sewerage system. The plaintiffs-petitioners contend that the Sewer Law postponed the connection of the entire Village to the sewer system by creating areas in which construction of the sewer was temporarily omitted or deferred pursuant to Village Law § 14-1400. The plaintiffs-petitioners argue that the Village had no authority to create such areas without obtaining the approval of the Commissioner of Health and that the failure to extend the sewer system to include the entire Village constitutes a continuing wrong not subject to any statute of limitations.

The court finds that the Village's Sanitary Sewer Law is a legislative act. The general rule is that a CPLR article 78 proceeding is unavailable to challenge the validity of a legislative act. However, when the challenge is not directed at the substance of the ordinance, but at the procedures followed in its enactment, it is maintainable as a CPLR article 78 proceeding (*see, Matter of Save the Pine Bush v Planning Bd. of City of Albany*, *supra* at 202). To the extent that the plaintiffs-petitioners' first cause of action is based on the Village's failure to comply with Village Law § 14-1400, it is maintainable as a CPLR article 78 proceeding, which should have

been commenced within four months of the enactment of the Sanitary Sewer Law (*see*, CPLR 217). Thus, the plaintiffs-petitioners' claims that the Village had no statutory authority to create and maintain the system without the approval of the Commissioner of Health and that the Village had no statutory authority to omit 90% of the Village from inclusion in the system are untimely.

Insofar as the plaintiffs-petitioners are challenging the sewer rents imposed by the Village for the fiscal years 2002-2003 through 2006-2007, the court finds that they are challenging administrative determinations. A CPLR article 78 proceeding is the customary procedural vehicle for review of administrative determinations. An action or determination is deemed to be administrative when it is characterized by its individualized application, limited duration, and informal adoption, e.g., resolution by the governing body (*see*, **Matter of Foley v Masiello**, 38 AD3d 1201, 1202; **Bennett Road Sewer Co. v Town Board of Town of Camillus**, 243 AD2d 61, 66). Those three requisites are present here. The per-unit charge of \$1,250 is applicable only to the plaintiffs-petitioners, and the Board of Trustees is empowered to fix by resolution a different annual unit charge from time to time (*see*, Sanitary Sewer Law § 42-6.2[G]). Moreover, the plaintiffs-petitioners claim that the per-unit charge of \$1,250 is excessive, disproportionate, and irrational. Such claims are clearly encompassed within the grounds for mandamus to review set forth in CPLR 7803 (3), and the four-month statute of limitations that ordinarily governs such proceedings is applicable (*see*, **New York City Health & Hosps. Corp. v McBarnette**, *supra* at 204).

The plaintiffs-petitioners do not challenge the sewer rents for the 2002-2003 fiscal year in their first cause for proceeding (mandamus to compel) or in their second cause for proceeding (mandamus to review). They acknowledge that this action-proceeding was not commenced within four months after the 2002-2003 sewer rents became final and binding. Thus, the first cause of action is untimely insofar as it seeks a judgment declaring that the sewer rents imposed by the Village for the 2002-2003 fiscal year are excessive, disproportionate, and irrational.

The plaintiffs-petitioners' claim that the sewer rents for the remaining years, 2003-2004 through 2006-2007, impose a disproportionate and irrational burden on commercial properties, as opposed to residential properties, is also time barred. It is undisputed that the Village first imposed different rates for commercial and residential users in 1995. Any challenge thereto should have been made within the four-month statute of limitations applicable to CPLR article 78 proceedings. In any event, residential and commercial properties may be treated differently in apportioning an assessment (*see*, **Pincus v Incorporated Village of Hempstead** 225 NYS2d 959, affd 16 AD2d 931).

It is well-established that the Village's authority to impose sewer rents is subject to the limitation that such charges be imposed only for the use of the system (*see*, General Municipal Law 451[a]; **Kinkead v Village of Round Lake**, 187 AD2d 905, 906; 1979 Opns St Comp No. 79-235). Thus, properties that are not actually connected to the sewer system cannot be charged sewer rents (*see*, **Kinkead v Village of Round Lake**, *supra* at 906). Accordingly, the plaintiffs-petitioners' claims that the Village has no authority to impose 100% of the cost of the system on the 10% of the properties actually connected to the system and that the system imposes a

disproportionate and irrational burden on commercial properties, as opposed to vacant properties and those properties not connected to the system, are unavailing.

Finally, the Village concedes that the plaintiffs-petitioners' claim that the sewer rents imposed by the Village substantially exceed the revenues needed to operate and maintain the system is not time barred as to fiscal years 2003-2004 through 2006-2007.

In view of the foregoing, the court grants summary judgment to Village on the first cause of action except insofar as it alleges that the sewer rents imposed by the Village substantially exceed the revenues needed to operate and maintain the system for the fiscal years 2003-2004 through 2006-2007.

Turning to the CPLR article 78 proceeding, the first cause for proceeding is in the nature of mandamus to compel. Mandamus may be used to compel the performance of an action required to be done by provision of law when the act sought to be compelled is ministerial, nondiscretionary and nonjudgmental, and is premised upon specific statutory authority mandating performance in a specified manner (*see, Matter of Bonanno v Town Board of the Town of Babylon*, 148 AD2d 532). An order in the nature of mandamus lies only when it is established that the petitioner has a clear legal right he is entitled to enforce and that a ministerial officer, whose duty it is to enforce the right or otherwise act in furtherance thereof, has refused to perform his duty (*see, Matter of Sullivan v Siebert*, 70 AD2d 975; *see also, Matter of Myron v Nelson*, 259 AD2d 549; *Matter of Vicinanza v Best*, 249 AD2d 739). It is used to enforce an administrative act required to be performed by law and involving no exercise of discretion (*see, Matter of Hamptons Hosp. & Med. Center v Moore*, 52 NY2d 88, 96). A body can be directed to act, but not how to act, in a manner as to which it has the right to exercise its judgment (*see, Matter of Bonanno v Town Board of the Town of Babylon*, *supra* at 533). Mandamus relief is not appropriate when the obligation sought to be enforced involves more than a mere ministerial act (*see, Brasseur v Speranza*, 21 AD3d 297, 297-298).

The plaintiffs-petitioners seek a judgment directing the Village to extend its sewer system to include all properties in the Village, to finance such extension by tax levy or special assessment on all of the taxpayers in the Village, and to adopt a new sewer rate structure that includes the entire Village. Such relief is clearly not ministerial, nondiscretionary, and nonjudgmental. Rather, it would require the Village to revamp the entire sewer system and the manner in which it is financed. Accordingly, mandamus to compel is not an appropriate remedy, and the first cause for proceeding is denied and dismissed.

The second cause for proceeding is in the nature of mandamus to review. The plaintiffs-petitioners seek an order annulling the sewer rents imposed on them by the Village for the fiscal years 2003-2004 through 2006-2007 on the ground that they are arbitrary, capricious, and an abuse of discretion insofar as (1) they impose a disproportionate and unreasonable burden on commercial properties, as opposed to residential properties, vacant properties, and those properties not connected to the system, (2) they are not reasonably related to the value of the benefits received by the plaintiffs, and (3) the revenues collected by the Village substantially exceed the revenues needed to operate and maintain the sewer system. In addition, the plaintiffs-petitioners seek

reimbursement for the sewer rents collected by the Village for such years.

It is settled law that the payment of a tax or fee cannot be recovered after the invalidation of the taxing statute or rule unless the taxpayer can demonstrate that the payment was involuntary or made under protest (*see, Video Aid Corp. v Town of Wallkill*, 85 NY2d 663, 666; *Trager v Town of Clifton Park*, 303 AD2d 875, 878 n 3). Thus, to the extent that the plaintiffs-petitioners seek recoupment of the sewer rents in question, any recoupment would be limited to only those fees paid under protest.

The plaintiffs-petitioners' claim that the sewer rents impose a disproportionate and unreasonable burden on commercial properties, as opposed to residential properties, vacant properties, and those properties not connected to the system, is duplicative of the first cause of action for a declaratory judgment. The court has already determined that the Village is entitled to summary judgment on that claim. Accordingly, the second cause for proceeding is denied and dismissed insofar as it alleges the sewer rents for the fiscal years 2003-2004 through 2006-2007 impose a disproportionate and unreasonable burden on commercial properties.

The Village concedes that the two remaining claims asserted by the plaintiffs-petitioners in their second cause for proceeding are not time barred, and the Village requests an opportunity to present additional legal arguments to the court regarding those claims, i.e., that the sewer rents for the years 2003-2004 through 2006-2007 are not reasonably related to the value of the benefits received by the plaintiffs and that the revenues collected by the Village for those years substantially exceed the revenues needed to operate and maintain the sewer system. Moreover, the plaintiffs-petitioners seek discovery regarding these two remaining claims. The motion is, therefore, denied as to those claims, and the parties are directed to work out a discovery and briefing schedule at their next conference with the court on December 3, 2007. Any party may thereafter re-notice this matter for a hearing on the merits (*see, CPLR 7804[f]*).

HON. ELIZABETH HAZLITT EMERSON

DATED: October 24, 2007

J. S.C.