

Matter of Serota Brown Court II, LLC v Town of Hempstead

2007 NY Slip Op 34330(U)

December 31, 2007

Supreme Court, Nassau County

Docket Number: 1540-07/

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 SEROTA
BROWN COURT II, LLC and 459-63 BROWN
COURT CORP.,**

Index No. 1540/07

**Motion Submitted: 10/15/07
Motion Sequence: 002, 003**

Petitioner(s),

**For a Judgment Under Article 78 of the Civil
Practice Law and Rules to annul and set aside the
determination of the Board of Appeals of the Town of
Hempstead dated December 6, 2005 and filed with
the Town Clerk on December 28, 2006, and to annul
and set aside the determination of the Town of
Hempstead Building Department denying a building
permit to Petitioner,**

-against-

**TOWN OF HEMPSTEAD, GERALD WRIGHT, as
Chairman, ROBERT O'BRIEN, WILLIAM
WEITZMAN, DOUGLAS DIANA, DAVID
McANDREWS, KATURIA D'AMATO and DAVID
WEISS as members of THE BOARD OF ZONING
APPEALS OF THE TOWN OF HEMPSTEAD,**

Respondent(s).

_____x

The following papers read on this motion:

Notice of Motion/Affirmation/Memorandums of Law/Exhibit.....XX
Notice of Cross Motion/Affirmation/Memorandum of Law/Exhibits.....XX
Respondent's Reply Memorandum of Law.....X

Motion by Respondents Town of Hempstead and the Town of Hempstead Board of Zoning Appeals for an Order dismissing this proceeding based upon the Petitioner Serota Brown Court II, LLC and 459-63 Brown Court Corp.'s failure to join a necessary party within the applicable limitations period is denied. Cross-motion by Petitioners for sanctions is denied.

By order dated December 31, 2007, this court granted the petition of the Town of Hempstead Building Department to intervene in this proceeding and denied its application to dismiss based upon Petitioners' failure to timely join it as a necessary party. The facts and issues there discussed will not be repeated here. Rather the court will address the timing issues raised by the procedural history of this case and Respondents contentions regarding the effects of such timing history.

In 2005 Petitioner originally sought a building permit to increase the height of its building pursuant to requirements set by the New York State Department of Environmental Conservation (DEC), which height was within the limits of the Industrial "Y" Zone where the property is located. Such construction was necessary, as this court noted in its prior order, to comply with a Department of Environmental Conservation (DEC) condition requiring that petitioner Serota Browns's C&D facility operate completely indoors.

Respondents set forth a contention, which this court accepts *arguendo* for purposes of this motion only. Respondents contend that prior to the application by Petitioners for a building permit, this Court in *Matter of Rieco Properties, Inc. v Town of Hempstead*, n.o.r., (Justice Martin) ruled that Section 220 of the Town Building Zone Ordinance was unconstitutional. At the time Section 220 prohibited otherwise permissible industrial uses, which could be considered "noxious or offensive by reason of emissions of odor, dust, flames, smoke, gas, vibration or noise . . . ". Notwithstanding *Rieco*, the Building Department denied Petitioners' application based upon Section 220. The Building Department found that Petitioners' C&D facility, which was engaged in construction and demolition debris recycling to be noxious and offensive. Petitioners appealed to the Zoning Board of Appeals.

While the Petitioners' appeal to the Board of Zoning Appeals was pending, the Appellate Division heard the appeal in *Matter of Rieco Properties, Inc. v Town of Hempstead* (20 A.D.3d 541, 797 N.Y.S.2d 912 [2d Dept., 2005]). That court did *not* hold Section 220 of the Ordinance unconstitutional (*Matter of Rieco Properties, Inc. v Town of Hempstead*, 20 A.D.3d 541, 797 N.Y.S.2d 912 [2d Dept., 2005]). Thus, before any ruling on Petitioners' appeal, the ordinance upon which the Building Department relied was redeemed.

The Town Board of Hempstead also amended the Town ordinance to require a special permit for C&D facilities, whether new or existing, during the pendency of Petitioners' BZA appeal. Accordingly, while Petitioners' appeal to the Zoning Board of Appeals was pending, the basis for its appeal was altered entirely; Section 220 of the Zoning Ordinance was constitutional, and was amended to require a special use permit for a C&D facility.

The Board of Zoning Appeals denied Petitioners a special use permit, and did not address Petitioners' appeal of the Building Department's denial of a building permit. This proceeding followed.

The essential claim of the Respondents here is that Petitioners' alleged erroneous step in appealing the Building Department's denial rather than commencing a direct article 78 against it was fatal. This Court disagrees.

An article 78 proceeding against the Building Department was required only if there were no factual issues, i.e., Section 220 of the Zoning Ordinance was unconstitutional as a matter of law (*see Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52, 57, 385 N.E.2d 560, 412 N.Y.S.2d 821 [1978]). In such a case exhaustion of administrative remedies would not be required (*Matter of Sievers v. City of New York*, 182 AD2d 580, 582 N.Y.S.2d 722 [1st Dept., 1992]).

However, the mere assertion by a Petitioner that a constitutional right is involved "will not excuse the failure to pursue established administrative remedies that can provide the required relief" (*Matter of Dozier v. New York City*, 130 A.D.2d 128, 135, 519 N.Y.S.2d 135 [2d Dept., 1987]). Alternative relief was available here, and in such case exhaustion is required (*Watergate II Apartments v. Buffalo Sewer Authority, supra*).

It is the Respondents' contention that Petitioner should have brought an Article 78 against the Building Department before the Appellate Division ruled in *Rieco*. If Petitioner took such a procedural step and prevailed, upon remand the Building Department could then deny the application again on different grounds because the law was amended to require a special use permit. Petitioners would then have to make application to the BZA and, presumably the Board would reach the same decision as it did here and deny the permit. Petitioners would then be exactly where they are now, in an Article 78 appealing the Board of Zoning Appeals decision in this Court.

The court finds such circuitous procedure unnecessary and not in accordance with law, as it violates the date of decision rule (*see Matter of Eckstein v. Glimm*, 84 A.D.2d 839, 444 N.Y.S.2d 474 [2d Dept., 1981], *app denied* 55 N.Y.2d 606, 433 N.E.2d 536, 448 N.Y.S.2d 1025 [1982]).

Under the date of decision rule the Courts (and the BZA) must apply the law as it exists at the time of decision. Thus at the time of the Petitioners' hearing, the Zoning Board of Appeals was required to address the issue of a special use permit, and the appeal of the Building Department denial upon grounds other than constitutionality. Parties "obtain no vested rights in the orders or judgments . . . while they are subject to review" (*Boardwalk & Seashore Corporation v. Murdock*, 286 N.Y. 494, 36 N.E.2d 678 [1941]).

Moreover, in *United States v. Schooner Peggy*, 1 Cranch 103, 110, Chief Justice Marshall said:

'It is in general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if *subsequent to the judgment and before the decision of the appellate court*, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case *the court must decide according to existing laws*, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.' So by a parity of reasoning, an order must be affirmed.

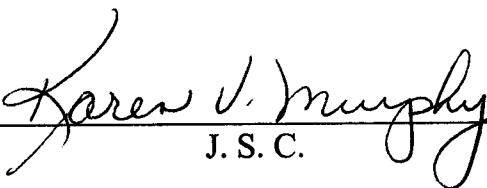
Here the Building Department's denial was unconstitutional when rendered, but not so when the Board of Zoning Appeals heard the appeal, and by "parity of reasoning" but for the amendment of the ordinance, the Board would have been required to examine claims whether the denial was wrongful upon other grounds raised by the Petitioners. Exhaustion of administrative remedies was required at the time of the hearing. The Building Department was not a necessary party to any appeal of its denial; nor is the court without authority to direct the Building Inspector to issue a building permit in an Article 78 proceeding against the Board of Zoning Appeals (*Ellington Const. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead*, 152 A.D.2d 365, 549 N.Y.S.2d 405 [2 Dept., 1989], *aff'd* 77 N.Y.2d 114, 566 N.E.2d 128, 564 N.Y.S.2d 1001 [1990]). *Ellington* is instructive in this regard. There the Petitioner commenced a CPLR Article 78 proceeding in the nature of mandamus to compel the Building Inspector of the Village of New Hempstead to issue a building permit. The Supreme Court, Rockland County, dismissed the proceeding for failure to exhaust administrative remedies reasoning that the "petitioner was required to appeal the denial of the building permit to the Zoning Board of Appeals of the Incorporated Village of New Hempstead" (*Ellington Const. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead*, *supra* at p 369). *Ellington* filed an appeal with the Zoning Board, which adopted a resolution confirming the Building Inspector's denial of its application for a building permit, and denied a variance for a certain lot D-10. The Supreme Court Rockland County heard and granted Petitioner's Article 78 against the New Hempstead Zoning Board and annulled the resolution adopted by the Zoning Board as

arbitrary and capricious. Notably, the court also “ directed the Village Building Inspector, a non party, to issue a building permit for lot D-10 (*supra* at p. 371). Accordingly, the Building Department is not a necessary party in this proceeding, and the court’s direction to issue a building permit is proper.

Inasmuch as the proposed counter-judgment more closely mirrors the Courts decision, it has been signed this date.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 31, 2007
Mineola, N.Y.



J. S. C.

ENTERED

JAN 17 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**