Matter of Serota Brown Court II, LLC v Town of Hempstead
2007 NY Slip Op 34331(U)
December 31, 2007
Supreme Court, Nassau County
Docket Number: 1540-07/a
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

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In the Matter of the Application of SEROTA BROWN COURT II, LLC and 459-63 BROWN COURT CORP.,

Petitioner(s),

Index No. 1540/07

Motion Submitted: 10/15/07
Motion Sequence: 004

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, 2006 and filed with the Town Clerk on December 28, 2006, and to annul and set aside the determination of the Town fo 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).

DEPARTMENT OF BUILDINGS OF THE TOWN OF HEMPSTEAD,

Proposed Intervenor,

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The following papers read on this motion:

Order to Show Cause/Affirmation/Memorandums of Law/Exhibits.....XX
Memorandum of Law in Opposition/Proposed Judgment.....X

Motion by the Building Commissioner and the Building Department of the Town of Hempstead for an Order permitting them to intervene in this Article 78 proceeding as "interested" parties, and upon intervention dismissing the proceeding upon the grounds that Petitioners failed to timely join them as indispensable parties is granted in part and denied in part. The movants shall be permitted to intervene pursuant to CPLR § 7802(d) as interested parties, and their motion to dismiss is denied as they are neither necessary nor indispensable parties.

This proceeding arises out of a denied building permit. Petitioners Serota Brown Court II, LLC and 459-63 Brown Court Corp. sought a building permit in order to increase the height of premises located at 459-63 Brown Court, Oceanside, New York . The additional height, which was within the limits in the Industrial "Y" Zone where the property is located, was necessary to comply with a Department of Environmental Conservation (DEC) condition requiring that Petitioner Serota Browns's C&D facility operate completely indoors. The petition avers that a C&D facility is a "solid waste recycling facility geared specifically to construction and demolition debris", i.e., a non organic waste product. The condition was part of a grant by the DEC of permission to transfer an existing DEC operator's permit from a company named Gator to Petitioner Serota Brown. Thus operation of a C&D facility was not new to the premises.

The Building Department denied a building permit on the grounds that the C&D operation, even though properly in an Industrial "Y' zone and completely indoors, would constitute a use, which is "noxious or offensive by reason of emissions of odor, dust, flames, smoke, gas, vibration or noise . . . " under then Section 220 of the Town Building Zone Ordinance. The "noxious or offensive" provision of the ordinance constituted an exception to Section 220's enumerated permissible uses.

Petitioners appealed the Building Department denial to the Board of Zoning Appeals. In the interim, the Zoning Ordinance was amended to require a special permit for the operation of a C&D facility. The Board held that the amendment was applicable to Petitioners' appeal and denied a special permit. This article 78 proceeding followed.

By Order dated August 2, 2007 this court held that Petitioners did not require a special permit under the revised ordinance as the C&D use "was preexisting and had not been

abandoned". The facility was previously approved for C&D use prior to the transfer to Petitioners and they had vested rights. Denial of the building permit by the Building Department was "arbitrary and capricious", as was the Board of Zoning Appeals December 6, 2006 determination denying Petitioners' application for a building permit or in the alternative for a special use permit. This court directed the Board "to issue the building permit applied for with appropriate conditions." The parties were directed to submit a judgment.

CPLR § 7802(d) provides that in a proceeding brought pursuant to Article 78 the court "may allow other interested parties to intervene". Permission to intervene in an Article 78 proceeding "may be granted at any point of the proceeding, including after judgment for the purposes of taking an appeal" (***Matter of Greater New York Health Care Facilities Ass'n v. DeBuono***, 91 N.Y.2d 716, 720, 697 N.E.2d 589, 674 N.Y.S.2d 634 [1998]).

Based upon the allegations of the Commissioner and Building Department that they are the only proper parties, they are granted leave to intervene in this proceeding as interested parties. Their motion to dismiss is entertained and denied (***see, Matter of Rent Stabilization Ass'n of New York City v. State Div. of Housing and Community Renewal***, 252 A.D.2d 111, 116, 681 N.Y.S.2d 679 [3d Dept., 1998]).

To support their claim that they are the only proper parties, the movants contend that their refusal to grant Petitioners' building permit was "unconstitutional" as a matter of law pursuant to ***Matter of Rieco Properties, Inc. v Town of Hempstead*** (20 A.D.3d 541, 797 N.Y.S.2d 912 [2d Dept., 2005]). They contend that the only remedy available to Petitioners was an Article 78 proceeding against the Building Department as it concerned an issue of law, i.e., whether the denial was unconstitutional. They aver that the Board of Zoning Appeals did not have jurisdiction.

The movants contend that they are not only necessary parties but are indispensable parties. They argue that this proceeding should be dismissed because there were no administrative remedies subject to exhaustion. Thus, they argue, the Board of Zoning Appeals is not a proper party to the constitutional challenge. They also contend that the Statute of Limitations has run against them at this time. Essentially the intervenors argue that Petitioners now have no remedy for an alleged constitutional deprivation.

Exhaustion of administrative remedies is required unless a statute "is alleged to be unconstitutional, by its terms or application, or where (it) is attacked as wholly inapplicable" (***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]). 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]). Here administrative exhaustion was required. And, contrary to the intervenors' contention, a constitutional issue is not involved.

With regard to the alleged constitutional issue, the intervenors' reliance upon ***Matter of Rieco*** is misplaced. ***Rieco*** did not hold the Town Ordinance, which prohibited "Y" industrial zone uses that are "noxious or offensive" unconstitutional. Moreover, even had the trial court so held, the Appellate Division did *not* affirm such ground. When a decision can be reached upon grounds other than a constitutional one, the constitutional issue will not be reached (***Matter of Syquia v. Board of Educ. of Harpursville Cent. School Dist.***, 80 N.Y.2d 531, 535, 606 N.E.2d 1387, 591 N.Y.S.2d 996 [1992]).

Both the lower court and the Appellate Division in ***Rieco*** found that the refusal to issue a building permit there was arbitrary and capricious based upon a failure to follow precedent or offer an explanation for the failure to do so, a non constitutional ground. The Appellate Division, calling the denial arbitrary and capricious, without further discussion cited two cases in support of the affirmance. The first, ***Matter of Charles A. Field Delivery Service*** (66 N.Y.2d 516, 518, 488 N.E.2d 1223, 498 N.Y.S.2d 111 [1985], held that "absent an explanation by the agency, an administrative agency decision which, on essentially the same facts as underlaid a prior agency determination, reaches a conclusion contrary to the prior determination is arbitrary and capricious". The Appellate Division also cited ***Matter of Civic Ass'n of Setaukets v. Trotta*** (8 A.D.3d 482, 483, 778 N.Y.S.2d 524 [2d Dept., 2004]) which held that a "decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious". The Appellate Division ruled upon arbitrary and capricious grounds, as did the trial court. And, as noted above, under "established principles of judicial restraint" courts do not address constitutional issues "when a decision can be reached on other grounds" (***Matter of Syquia v. Board of Educ. of Harpursville Cent. School Dist., supra*** at 535). Accordingly the intervenor's argument that ***Rieco*** declared part of the zoning ordinance unconstitutional is without merit.

The movants now seeks dismissal based upon Petitioners failure to timely join them as necessary and indispensable parties.

CPLR § 1001 declares that persons should be joined who "ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment". When "justice requires" an action may proceed without necessary parties when the Statute of Limitations has run against them. The considerations are:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

5. whether an effective judgment may be rendered in the absence of the person who is not joined.

These critical factors militate in favor of Petitioners. They will have no remedy if this proceeding is dismissed, and no prejudice accrues to the Building Department. Its interests are adequately protected by the Board of Zoning Appeals "as they 'stand or fall together'" (***Matter of Sandor v. Nyquist,*** 45 A.D.2d 122, 124, 356 N.Y.S.2d 703 [3d Dept., 1974]). Moreover, an effective judgment can be rendered in the Building Department's absence, as the Board of Zoning Appeals has the power to order the Building Department to issue a building permit. Indeed the Board's power to "reverse or affirm" a determination of the Building Department or Commissioner includes the express power to "make such order, requirement, decision, interpretation or determination as in its opinion ought to have been made in the matter" by the Commissioner or Building Department and "to that end shall have all the powers of the administrative official from whose order, requirement, decision, interpretation or determination the appeal is taken" (***Town Law*** § 267-b[1]).

More importantly, a party who performs a ministerial act is not a necessary party to an Article 78 proceeding (***Fisher v. Sampson,*** 27 A.D.3d 560, 813 N.Y.S.2d 136 [2d Dept., 2006]). A "ministerial act envisions direct adherence to a governing rule or standard with a compulsory result" (***Green v. City of New York***, 181 Misc.2d 607, 694 N.Y.S.2d 881 *affd* 192 Misc.2d 270, 746 N.Y.S.2d 740 [N.Y. Sup. App.Term 2002]). Issuance of a building permit is a ministerial act when the Building Department is directed to do so by the Board of Zoning Appeals upon granting a variance. Indeed issuance of a building permit by the Board of Zoning Appeals is a ministerial act under such circumstances. (***Matter of Charter Land Development Corp. v. Hartmann***, 170 A.D.2d 600, 566 N.Y.S.2d 375 [2d Dept., 1991], app den 78 N.Y.2d 857, 580 N.E.2d 410, 574 N.Y.S.2d 938 [1991]).

Accordingly, Petitioners are not indispensable parties, and even if they were this proceeding could continue without joinder. It is noted, that having been granted intervention, the intervenors now have only the right to appeal the judgment previously directed.

The foregoing constitutes the Decision and Order of this Court.

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

Karen V. Murphy
J. S. C.