

Mannarino v Options for Community Living, Inc.

2008 NY Slip Op 30732(U)

February 29, 2008

Supreme Court, Suffolk County

Docket Number: 0031959/2007

Judge: Joseph C. Pastoressa

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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: # 001-MD
002-Mot-d

MARY C. MANNARINO and MARTY PAOLINO,
individually and as representatives of the residents
of the Town of Islip who are similarly situated,

ATTYS FOR PLAINTIFF(S):
MAZZEI AND BLAIR
9B MONTAUK HIGHWAY.
BLUE POINT, NY 11715

Plaintiff(s),

-against-

OPTIONS FOR COMMUNITY LIVING, INC.,

ATTYS FOR DEFENDANT(S):
RUSSO, KARL, WIDMAIER & CORDANO, PLLC
400 TOWN LINE ROAD
HAUPPAUGE, NY 11788

Defendant(s),

X

Pages Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2
Opposing Affidavits (Affirmations) 3
Reply Affidavits (Affirmations) 4
Affidavit (Affirmation) _____
Other Papers _____

Upon the foregoing papers, the plaintiffs application for an order (motion sequence #001) for a preliminary injunction is denied and their application to renew and/or reargue the denial of a temporary restraining order dated October 15, 2007 (#002) (Whelan, J.) is denied as moot.

The plaintiffs commenced this action via summons and verified compliant on or about October 13, 2007 seeking an injunction restraining the defendant, Options for Community Living, Inc. (hereinafter "Options"), from completing the site selection process with regard to establishing a community residence located at 192 West Main Street, East Islip, New York (hereinafter "subject premises") and from obtaining a certificate of occupancy pending a final determination of an Article 78 filed against the Town of Islip (hereinafter "Town").¹ The defendant, a not-for-profit corporation providing rehabilitation services to adults with psychiatric disabilities, identified the subject premises as a potential community residence on or around February of 2006 for 10 adults with psychiatric

¹ The plaintiffs have commenced an Article 78 proceeding against the Town of Islip in the matter of Mary C. Mannarino and Marty Paolino, individually and as a representatives of the residents of the Town of Islip who are similarly situated v. Town of Islip, under index number 31960-2007 which is sub judice.

disabilities. The defendant sent a letter dated February 28, 2006 to Supervisor McGowan, Town of Islip Supervisor, in accordance with Section 41.34(c)(1) of the New York State Mental Hygiene Law notifying the Town of its intent to establish a community residence at the subject premises. The Supervisor of the Town sent a letter dated March 2, 2006 to Options acknowledging receipt of Options notification of its intent to develop the site. The defendant sent a letter dated April 24, 2006 to the acting supervisor of the Town indicating that the time period for the Town to respond to the proposal had elapsed and its intent to proceed with establishment of the community residence. The defendant obtained ownership of the subject premises on August 23, 2006. The plaintiffs were advised by Marilyn Sullivan of the Office of Mental Retardation and Developmental Disabilities at a community meeting held on October 4, 2007 that the plaintiffs had provided notice to the Town and that the defendant was developing the site for approximately 10 adults with psychiatric disabilities.

The plaintiffs' aver that they were never notified either verbally or in writing from the Town or the defendant of the defendant's intent to establish a community residence. The plaintiffs' aver that they were never given the opportunity to submit evidence of whether a saturation of these types of community residences existed or if this was an appropriate site for a community residence. The defendant in opposition avers that there is no legal basis in granting the preliminary injunction and that they simply followed the law in obtaining the requisite approvals.

A preliminary injunction is a drastic remedy that should be used sparingly and the movant has the burden of establishing a clear right to this equitable remedy (see, McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc., 114 AD2d 165; Town of Smithtown v. Carlson, 204 AD2d 537). To be entitled to a preliminary injunction under CPLR §6301, the movant must establish "(1) a likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor" (Ruiz v. Meloney, 26 AD3d 485, 485-486; see, Lattingtown Harbor Prop. Owners Assn., Inc. v. Agostino 34 AD3d 536; IVI Environmental, Inc. v. McGovern, 269 AD2d 497; Khan v. Univ. of N. Y. Health Science Ctr., 271 AD2D 656).

The plaintiffs complaint for an injunction avers that the defendant should be enjoined pending the determination of the Article 78 proceeding against the Town based on the Town's alleged failure give notice of the defendant's intent to develop the subject premises as well as the failure of the defendant to properly notify the Town in accordance with the Mental Hygiene Law §41.34(a).

The plaintiff fails to establish the likelihood of success on the merits (see, Town of Stony Point v. N.Y. State Office Of Mental Retardation & Developmental Disabilities, 78 AD2d 858). Mental Hygiene Law §41.34 (c) (1) states:

"When a site has been selected by the sponsoring agency, it shall notify the chief executive officer of the municipality in writing and include in such notice the specific address of the site, the type of community residence, the number of residents and the community support requirements of the program. Such notice shall also contain the most recently published data compiled pursuant to section four hundred sixty-three of the social services law which can reasonably be expected to permit the municipality to evaluate all such facilities affecting the nature and character of the area wherein such proposed facility is to be located."

Mental Hygiene Law §41.34 (c) (1)(A),(B),(C) provides that a municipality within forty days of receipt of a letter of intent to establish a community residence may either: approve the site; suggest one or more suitable sites; object to the establishment of the

facility; or not respond. In the case at bar, the defendant sent a letter dated February 28, 2006 to the Supervisor of the Town of its intent to establish a community residence at the subject premises. The Town sent a letter dated March 2, 2006 acknowledging receipt of the defendant's letter of its intent to develop the subject premises as a community residence. The defendant after having waited the statutory forty days sent a letter to the Town of its intent to proceed with the community residence at the subject premises. Mental Hygiene Law § 41.34 (C) provides that a sponsoring agency is entitled to establish a proposed facility upon the failure of a municipality to submit a formal response within 40 days of receipt of the notice of intent to develop the community residence (see, Polo Park Civic Assn. v. Kiernan, 133 AD2d 116; Town of Stony Point v. N.Y. State Office Of Mental Retardation & Developmental Disabilities, supra). The Appellate Division, Second Department, in Joy Builders, Inc., v. Ballard, 20 AD3d 534 stated: “[t]he remedy of mandamus is available ‘to compel the performance of a ministerial, nondiscretionary act where there is a clear legal right to the relief sought’ (Matter of Savastano v. Pervost, 66 NY2d 47, 50, 485 NE2d 213, 495 NYS2d 6 [1985; see CPLR §7803[1]; Matter of Legal Aid Soc. Of Sullivan County v. Scheinman, 53 NY2d 882 [1981]) Mandamus, however, ‘will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion’ Klostermann v. Cuomo, 61 NY2d 525, 539, 463 NE2d 588, 475 NYS2d 247 [1984] [internal quotation marks omitted]; see People ex rel. Hammond v. Leonard, 74 NY 443, 445 [1878])”. Here, the Town's decision not to formally take any action regarding the defendant's notice of intent dated February 28, 2006 was clearly a discretionary act, and mandamus will not lie to review such a determination (see, Klostermann v. Cuomo, 61 NY2d 525; Polo Park Civic Assn. v. Kiernan, supra; Town of Stony Point v. N.Y. State Office Of Mental Retardation & Developmental Disabilities, supra; Oyster Bay v. State of New York Office of Mental Retardation and Developmental Disabilities, 115 AD2d 536). Furthermore, neither Options nor the Town is obligated under the Mental Hygiene Law to notify the surrounding neighbors of the proposed facility (see generally, MHL §41.34).

The plaintiffs' aver that the defendant's letter to the Town dated February 28, 2006 of its intent to develop the subject premises is defective as it did not allegedly contain the “most recently published data compiled pursuant to section four hundred sixty three of the Social Services Law which can reasonably be expected to permit the municipality to evaluate all such facilities affecting the nature and character of the area wherein such proposed facility is to be located” (see, MHL §41.34[c][1]). The defendant attaches an unrefuted affidavit from Diana Antos Arens, executive director of Options, that she sent the letter dated February 28, 2006 to the Supervisor of the Town pursuant to the MHL §41.34 of its intent to develop the site. The defendant attaches the letter dated February 28, 2006 along with the enclosures including the disputed New York State Department of Social Registry. The plaintiffs' conclusory and unsubstantiated allegations that the letter dated February 28, 2006 sent to the Town did not contain a listing of the social registry is belied by the defendant's affidavit and the letter itself, which makes specific reference that the social registry is enclosed in the letter.

“Procedural due process safeguards apply where the aggrieved party can show deprivation of a protected right as a result of ‘State action’. Purely private conduct is not subject to the requirements of due process” (Montalvo v. Consolidated Edison Co., 92 AD2d 389, 393). The plaintiffs' averment that the defendant should be enjoined from developing the site vis a vis the Town's alleged violation of their constitutional rights for failure to act upon the defendant's notification of its intent to develop the subject premises

and to notify the residents of the proposal to develop the site will not lie as the defendant is a private entity and therefore, vitiates any claim that the defendant violated the plaintiffs constitutional rights to notice and opportunity to be heard.

The plaintiffs fail to show that they will sustain irreparable injury absent the granting of the preliminary injunction. The plaintiffs' mere allegation that they will be unable to prevent the operation of the community residence at a later date unless it is enjoined immediately fails to meet its burden (see, Town of Stony Point v. N.Y. State Office Of Mental Retardation & Developmental Disabilities, supra) and bare allegations that the proposed site will change the nature of the community or is highly inappropriate to the surrounding community is insufficient to show irreparable injury (see, Matos v. City of New York, 21 AD3d 936; Neos v. Lacey, 2 AD3d 812; White Bay Enters., Ltd. v. Newsday, Inc., 258 AD2d 520). Finally, the plaintiffs failed to establish that a balancing of the equities was in their favor (see, Schweizer v. Town of Smithtown, 19 AD3d 682).

This shall constitute the decision and order of the court.

DATED: February 29, 2008



HON. JOSEPH C. PASTORESSA, J.S.C.