1 COPY *

Index No: 31960-07

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

PRESENT:
HON. JOSEPH C. PASTORESSA

Motion R/D: 10/25/07
Adj. Date: 1/9/08
Mot Seq: # 001-**Mot-d**
002-**Mot-d**
003-**MG** CASE DISP
004-**Mot-d**
CASE DISP

ATTYS FOR PETITIONERS:
MAZZEI AND BLAIR
9B MONTAUK HIGHWAY
BLUE POINT, NY 11715

ATTYS FOR RESONDENTS:
ERIN A. SIDARAS
ASSISTANT TOWN ATTORNEY OF COUNSEL TO
ROBERT L. CICALE, TOWN ATTORNEY
655 MAIN STREET
ISLIP, NEW YORK 11751

In the matter of

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

Petitioners,

For a Judgment under Article 78 of the Civil Practice Law and Rules that the Town of Islip failed to perform a duty enjoined upon it by law and/or that a determination of the Town of Islip was made in violation of lawful procedure, was an error of law and was both arbitrary and capricious and an abuse of discretion

-against-

TOWN OF ISLIP,

Respondents,

Pages Numbered
Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2, 3, 5
Opposing Affidavits (Affirmations) 6, 7
Reply Affidavits (Affirmations)
_____Affidavit (Affirmation)
Other Papers 4 (Memorandum of Law)

Upon the foregoing papers, the petitioners move for an order (motion sequence #001) seeking a preliminary injunction; rearguing and renewing (motion sequence #002) the order (Whelan, J.) of the court dated October 15, 2007 denying a temporary restraining order and upon such reargument and renewal granting a temporary restraining order against the respondent, Town of Islip; and (motion sequence #004) permitting the petitioners to amend the petition and consolidating the above referenced matter with the matter of Mary C. Mannarino and Marty Paolino, individually and as representatives of the residents of the Town of Islip who are similarly situated against Options for Community Living, Inc. under index number 31959-2007; and the respondent moves for an order (motion sequence #003) dismissing the petitioner's Article 78 proceeding pursuant to CPLR §§3211 (a)(7) and (10). It is

ORDERED, that the respondent's application dismissing the petitioners Article 78

proceeding is granted; and it is further

ORDERED, that the petitioner's motions requesting various relief are denied as moot.

The petitioners, Mary C. Mannarino and Marty Paolino, individually and as representatives of the residents of the Town of Islip who are similarly situated commenced this Article 78 proceeding via a verified petition on or about October 13, 2007 against the Town of Islip (hereinafter "Town") in connection with the establishment of a community residence facility owned by a not-for-profit corporation named Options for Community Living, Inc.(hereinafter "Options") for the property located at 192 West Main Street, Islip, New York[1] (hereinafter "subject premises"). Ms. Diana Antos Arens, Executive Director of Options sent a letter dated February 28, 2006, to the Town notifying them of its intent to develop a community residence at the subject premises for ten adults who have psychiatric disabilities pursuant to § 41.34 of the Mental Hygiene Law. The Supervisor of the Town sent a letter dated March 2, 2006 to Options acknowledging Options notification of its intent to establish a community residence. Mr. Eugene J. Murphy, Commissioner of the Department of Planning and Development of the Town, issued a memorandum to the acting supervisor of the Town dated April 17, 2006 indicating that the proposed site "would not constitute impaction according to the Padavan Law"[2] and that "the location for this Community Residence is reasonable". Ms. Arens 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 the community residence. Options closed on the premises on August 23, 2006. The petitioners learned of the proposed community residence, when a neighbor spoke with contractors working on the subject premises on or about October 2, 2007. The petitioners were advised by a Marilyn Sullivan of the Office of Mental Retardation & Developmental Disabilities at a community meeting held on October 4, 2007, that Options had provided notice to the Town.

In sum and substance, the petition avers the following constitutes a failure to perform a duty enjoined upon it by law, was in violation of lawful procedure, was arbitrary and capricious, and in violation of their constitutional rights: the Town's failure to give notice to any of the residents near the site of the proposed community residence; the Town's failure to provide an opportunity to submit evidence as to whether saturation existed of similar community residences in relation to this one and whether this community residence is appropriately located.

"On a motion pursuant to CPLR §7804 (f) to dismiss a petition, only the petition is to be considered and all of its allegations are deemed to be true" (Albi v. Cmty. Bd. No. 2, 17 AD3d 459, 459). When considering a motion to dismiss pursuant to CPLR §3211(7), the court must accept as true the facts as alleged in the complaint and afford the plaintiff the benefit of every possible inference in determining whether the complaint states any legally cognizable cause of action (see, Town of Riverhead v. County of Suffolk, 39 AD3d 537). However, "it is well settled that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether she [or he] has stated one" (Hartman v. Morganstern, 28 AD3d 423,424).

---

[1] The petitioners have commenced an action against Options for Community Living Inc. in the matter of Mary C. Mannarino and Marty Paolino, individually and as representatives of the residents of the Town of Islip who are similarly situated against Options for Community Living, Inc. under index number 31959-2007, which is sub judice.

[2] The Mental Hygiene Law §41.34 is referred to generally as the Padavan Law.

The petitioners aver that the Town's failure to give them notice of the proposed community residence and the opportunity to submit evidence constitutes a failure to perform a duty enjoined upon it by law. A municipality within forty days of receipt of a letter of intent to establish a community residence pursuant to Mental Hygiene Law §41.34 (A), (B), (C) may either: approve the site; suggest one or more suitable sites; object to the establishment of the facility; or not respond. Moreover, pursuant to Mental Hygiene Law § 41.34 (C) 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 Asso. v. Kiernan, 133 AD2d 116; Town of Stony Point v. N.Y. State Office Of Mental Retardation & Developmental Disabilities, 78 AD2d 858). 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])." In the case at bar, the Town's decision not to formally take any action within 40 days of Option's notice of intent dated February 28, 2006 was clearly a discretionary act, and mandamus will not lie to review such determination (see, Klostermann v. Cuomo, 61 NY2d 525; Polo Park Civic Asso. 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 petitioners further aver in opposition papers that Option's letter to the Town dated February 28, 2006 failed to include the required Social Services Law §463 registry, and therefore any approval granted pursuant to such defective notice is a nullity. The petitioners' argument is simply without merit. The petition does not contain any averments of the alleged defective notice. Moreover, the Town submits in support of the application the Options's letter dated February 28, 2006, which specifically mentions in the letter that it is enclosing the social services registry. More critical, the petitioners argument cannot be sustained in light of the Town's concession that it received the social services registry with the letter (see, Incorporated Village of Westbury v. Maul, 263 AD2d 508).

It is well established that arbitrary action pursuant to CPLR §7803 is action without sound basis in reason and is taken without regard to the facts (see, Pell v. Board of Education, 34 NY2d 222, 231). Moreover, a court may not substitute its judgment for that of a town board but must restrict its consideration to whether the action was taken without sound basis in reason and without regard to the facts (see, Lemir Realty Corp. v. Larkin, 10 AD2d 1005). In the case at bar, the petition fails to allege a claim that the inaction of the Town was without sound basis in reason and without regard to the facts. The petition avers that "petitioners and residents similarly situated have not been given the opportunity to show how the establishment of this particular community residence would not only over-saturate the East Islip area but also is not an appropriate location because it would alter and change the landscape and nature of the community." Furthermore, the petition avers that the community residence is located a "very short distance away" from another community residence and that it is across the street from a park and playground where young people play soccer as well as within a short distance to a number of childcare centers. The mere allegation of another facility

located near the proposed site as well as concerns of the location of the community residence to parks and child care centers contained in the petition fails to state an arbitrary and capricious claim. Notwithstanding, the Town in support submits an uncontroverted memorandum dated April 17, 2006 from Eugene Murphy, Commissioner, Department of Planning and Development of the Town, to the acting supervisor of the Town, that shows that the Town considered the location of the community residence in relation to other dwellings and determined that the location and the proximity "would not constitute impaction according to the Padavan Law" and "that the location for this Community Residence is reasonable". Moreover, that Montauk Highway is suitable for community residences such as the subject premises and that it is a reasonable transitional location. The petitioners bare and conclusory averments regarding the location of the community residence fail to support that the Town's decision was without sound basis in reason and without regard to facts. The fact that the written memorandum of the Town was issued after the 40-day time period is of no import since the statute does not require the Town to put its decision in writing within the statutory time frame and it is only evidence to rebut the mere allegation that the Town did not consider the location of the community residence and its impact on the community.

Finally, the petitioners aver that the Town's failure to notify the residents of the proposed community residence violates their constitutional rights to notice and an opportunity to be heard. Several appellate courts have ruled, and this court is bound by those rulings, that "the absence of any provision for notice and public hearing in the Padavan Law does not render it constitutionally defective. The Padavan Law is an act of general legislation and therefore requires neither notice nor a public hearing to effect the desired change" (Zubli v. Community Mainstreaming Assn., 102 Misc 2d 320,333, *affd* 74 AD2d 624; *mod* 50 NY2d 1024; see, Board of Educ. of Sewanhaka Cent. School Dist. v. Surles, 145 Misc 2d 149; see generally, Crane Neck Ass'n v. New York City/Long Island County Servs. Group, 61 NY2d 154[3]). Accordingly, the petitioners have failed to establish a violation of their constitutional rights.

This shall constitute the decision and order of the court.

DATED: February 11, 2008

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

H:\Article 78\MannarinoMHL2.11.08

[3] Case provides a discussion of the general intent of MHL section 41.34.