

**Matter of American Chophouse Enters., LLC v
Town of Huntington**

2008 NY Slip Op 31137(U)

April 14, 2008

Supreme Court, Suffolk County

Docket Number: 0018049/2007

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 18049/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

AMERICAN CHOPHOUSE ENTERPRISES,
LLC,

Petitioner,

-against-

for a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules and other relief
against

THE TOWN OF HUNTINGTON, PLANNING
BOARD OF THE TOWN OF HUNTINGTON,
PAUL MANDELIK, JANE DEVINE,
MITCHELL SOMMER, AVRUM ROSEN,
LORRAINE SANTOIANI, STEVEN
SCHNITTMAN and LYNN HEALY each as
Members of the PLANNING BOARD OF THE
TOWN OF HUNTINGTON,

Respondents.

ORIG. RETURN DATE: JULY 19, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 001(003)
MOTION: MOT D

ORIG. RETURN DATE: AUGUST 1, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 002(004)
MOTION: MD

ORIG. RETURN DATE: OCTOBER 25, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 005
MOTION: MD

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Upon the following papers numbered 1 to 18 read on these motions _____
FOR A JUDGMENT PURSUANT TO ARTICLE 78, TO DISMISS, AND TO COMPEL _____.
Notice of Verified Petition and supporting papers 1-3; Notice of Motion to Dismiss and
supporting papers 4-6; Notice of Motion and supporting papers 7-9; Affidavit in Opposition
and supporting papers 10; Memorandum of Law 11; Affirmation in Further Support and
supporting papers 12, 13; Reply Affidavit and supporting papers 14, 15; Reply
Affirmation and supporting papers 16; Reply Memorandum of Law 17; Memorandum
of Law in Opposition 18; it is,

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR: (a) vacating "Condition 5" of a resolution filed by respondent PLANNING BOARD OF THE TOWN OF HUNTINGTON (the "Planning Board") with the Town Clerk on May 15, 2007 (the "Resolution"), which seeks to exact two public access easements as a condition of approving an amended site plan that petitioner had submitted for approval; (b) upon such vacatur, remanding the matter to the Planning Board for the filing of a resolution without Condition 5, on the ground that such condition was arbitrary, capricious, an abuse of discretion, and contrary to law; and (c) awarding costs and disbursements of this proceeding to petitioner, is hereby determined as provided hereinafter; and it is further

ORDERED that this motion by respondents for an Order, pursuant to CPLR 3211(a)(10), 1001(a), and 7804(f), dismissing the instant proceeding for failure to join a necessary party, and based upon objections in point of law in favor of respondents, is hereby determined as provided hereinafter; and it is further

ORDERED that this motion by petitioner, pursuant to CPLR 406, for an Order directing respondent THE TOWN OF HUNTINGTON to: (1) issue a certain building permit under identification number 04-10-07-18, in connection with petitioner's outdoor porch/deck/patio, to conduct site inspections of the work promptly thereafter, and to issue a certificate of occupancy for the improvements made pursuant to such permit; and (2) process with diligence those certain building permit applications bearing identification numbers 04-10-07-19, in connection with petitioner's cabana, and 04-10-07-20, in connection with petitioner's walk-in freezer, is hereby **DENIED** for the reasons set forth hereinafter.

By Order of even date, this Court has determined a motion by the Town for a preliminary injunction and a cross-motion by defendant AMERICAN CHOPHOUSE ENTERPRISES, LLC to dismiss in a related action entitled *Town of Huntington and Huntington Sewer District v. Port Dock and Stone Corp., and American Chophouse Enterprises, LLC a/k/a Prime Restaurant*, under index number 26493/2007.

Petitioner AMERICAN CHOPHOUSE ENTERPRISES, LLC is a limited liability company whose sole asset is a leasehold in the premises commonly known as 117 New York Avenue, Huntington, which is improved with a

restaurant, and 110 New York Avenue, Huntington, which contains a parking lot that services the restaurant. The managing members of petitioner are JOHN BOHLESEN and MICHAEL BOHLESEN. The fee owner of the subject real property is non-party PORT DOCK AND STONE CORP. ("PDSC"). The zoning for the property is C-9 Harbor Use District and R-80 Residential District. Petitioner leases the premises from PDSC pursuant to a forty-year lease dated May 1, 2005, and operates a restaurant thereupon known as "Prime Restaurant." Prior thereto, PDSC operated a restaurant and nightclub on the premises known as "CoCo's Water Café" for nearly twenty years. Petitioner informs the Court that PDSC's site plan for the premises was approved by the Town on or about March 12, 1991, which contemplated the construction and operation of a waterside restaurant with outdoor patio area. The premises are currently comprised of a main restaurant building, an outside deck and terrace in the rear of the property (waterside), and accessory structures used as bars, a cabana, bathrooms, and a walk-in freezer.

On or about May 3, 2005, the Town issued building permit number PO-50966A in connection with petitioner's proposed renovations to the existing restaurant and outdoor patio. Petitioner alleges that it spent approximately \$10 million to perform the renovations. Thereafter, on or about January 19, 2006, the Town's Zoning Board of Appeals granted an application by petitioner for a "minor" parking variance, which authorized the construction of a 1763 sq. ft. accessory building. However, petitioner alleges that it decided not to build the accessory building, but instead built a smaller cabana of 484 sq. ft.

Petitioner alleges that in the Fall of 2006, the Town notified petitioner that a raised patio/deck and cabana on the premises were not authorized pursuant to the aforementioned building permit and ZBA decision. The parties resolved the matter by Stipulation dated October 31, 2006 ("Stipulation"), which provided, among other things, that petitioner would not use the raised patio/deck or cabana until such time as a certificate of occupancy was issued by the Town, and that petitioner would "diligently" prepare and file a site plan application with the Planning Board. The parties agreed to a civil fine against petitioner in the amount of \$10,000.00 for the renovations made without an approved site plan, building permit, or certificate of occupancy.

The Stipulation also referenced a proposed waterfront promenade and/or walkway being considered by the Town. As such, petitioner agreed to provide, as lessee of the premises, an easement to the Town described as "a

strip of land approximately [e]ight (8) feet in width, running the length of the parcel parallel to the existing bulkhead on the most westerly side of the premises, running in roughly a north-south direction . . . for free and unencumbered public pedestrian passage as part of a promenade (walkway) to be constructed, *at such time as the TOWN is ready to construct and open the promenade for public use along the entire eastside of Huntington Harbor. No such public access will be allowed until the TOWN actually constructs and opens the east promenade around Huntington Harbor*" (emphasis supplied).

Pursuant to the Stipulation, petitioner filed an amended site plan with the Planning Board which incorporated the patio/deck and cabana. By resolution dated April 25, 2007, the Planning Board conditionally approved the amended site plan. Condition number 5 therein provides in pertinent part that "[p]ursuant to the Zoning Board of Appeals decision and the Stipulation of Settlement, the applicant shall provide an easement or Right of Way or dedication of property approximately eight (8) feet in width along the entire waterfront area of the site plan. Including an eight (8) feet wide easement, right of way or dedication across the landscape area denoted along the northwest corner of the site plan."

Petitioner alleges that the Planning Board, unilaterally and without notice to petitioner, rescinded the resolution dated April 25, 2007 and passed a resolution dated May 9, 2007. The May 9, 2007 resolution also contained "Condition 5" with respect to the two easements, but imposed more onerous terms on petitioner with respect to the creation of the easements. In addition, petitioner alerts the Court that any reference to the Zoning Board of Appeals decision and the Stipulation was deleted from the May 9, 2007 resolution. Petitioner argues that the Planning Board was trying to "cover up the Town's prior commitment," as the parties had agreed that: (1) the easement along the waterfront would be conveyed only when the Town had obtained the necessary access rights from other owners of neighboring properties, had implemented plans to construct the promenade, and had begun construction; and (2) only one easement was to be conveyed along the waterfront, not a second easement from New York Avenue across petitioner's property to the water for public ingress and egress. Petitioner informs the Court that it has complied with the other four conditions imposed by the Town, and, upon information and belief, the Town has not yet begun studies, applied for the necessary permits, or begun construction on a waterfront promenade.

In view of the foregoing, petitioner alleges that the Town is improperly trying to exact two easements from the property as a condition of approval of petitioner's site plan concerning an unrelated patio/deck and cabana, in violation of Town Law and controlling case law. Petitioner argues that the Town cannot condition site plan approval on land donation for public recreational purposes, and that pursuant to Town Law § 274-a(4), any conditions imposed must be directly related to and incidental to a proposed site plan. Further, petitioner argues that the Stipulation only contemplated one easement along the waterfront, and only when the Town had actually begun construction on the promenade. As such, petitioner argues that the Town's action of imposing "Condition 5" in the May 9, 2007 resolution was irrational, arbitrary, capricious, *ultra vires*, contrary to law, and in violation of the parties' Stipulation. Petitioner further argues that the second proposed easement across petitioner's property would violate the parking variance granted by the ZBA referenced hereinabove. Finally, petitioner asserts that pursuant to the subject lease agreement, petitioner has no authority to grant such easements in the property.

The Town has filed a motion to dismiss the petition, pursuant to CPLR 3211(a)(10), 1001(a), and 7804(f), for failure to join a necessary party, to wit: PDSC, and based upon objections in point of law. The Town argues that as PDSC was listed as a co-applicant on the application for site plan review submitted on or about January 11, 2007, and is the owner of the subject real property, this proceeding should be dismissed for failure to join PDSC as a co-petitioner herein. In addition, the Town refers to the May 9, 2007 resolution which grants conditional approval to both petitioner and PDSC.

Subsequently, petitioner filed a motion, pursuant to CPLR 406, seeking an Order directing the Town to: (1) issue a certain building permit under identification number 04-10-07-18, in connection with petitioner's outdoor porch/deck/patio, to conduct site inspections of the work promptly thereafter, and to issue a certificate of occupancy for the improvements made pursuant to such permit; and (2) process with diligence certain building permit applications bearing identification numbers 04-10-07-19, in connection with petitioner's cabana, and 04-10-07-20, in connection with petitioner's walk-in freezer.

In support thereof, petitioner has submitted an affidavit of MICHAEL BOHLSSEN, a managing member of petitioner; an affidavit of RAYMOND M. CALAMARI, an architect and president of Arcalhek Architects P.C., the architect of record for the construction project at the premises; an affidavit of SEAN

MURRAY, vice president of J.T. Magen & Co., Inc., petitioner's construction manager for the project; an affidavit of ORESTE ALBICOCCO, the president and owner of PDSC; and an affirmation of petitioner's counsel. The gravamen of petitioner's argument is that the Town is unreasonably refusing to issue a building permit and certificate of occupancy for petitioner's outdoor porch/deck/patio, and is refusing to process two other building permit applications of petitioner's in connection with petitioner's cabana and walk-in freezer, as a result of petitioner's refusal to accede to the Town's request with respect to the easements. Mr. Murray attests to the quality of the work performed, and the Town's knowledge and approval of the work during the progress of construction. Mr. Calamari avers, among other things, that all work on the main building structure, outdoor rear decks attached to the main building, fantail deck, and fire pit were built to Code.

Petitioner has also submitted the foregoing affidavits and affirmation in opposition to the Town's application for a preliminary injunction and in support of petitioner's motion to dismiss in the related action pending under index number 26493/2007. The specific details of the arguments therein are more fully developed in this Court's Order of even date in the related action.

With respect to the Town's motion to dismiss for failure to join PDSC, CPLR 1001 provides in pertinent part that "[p]ersons 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 in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant" (CPLR 1001[a]). With respect to the latter requirement, the possibility that a judgment rendered without the omitted party could have an adverse practical effect on that party is enough to indicate joinder. A principal reason for compulsory joinder of parties is to protect non-parties whose rights should not be jeopardized if they have a material interest in the subject matter (*see 27th St. Block Ass'n v Dormitory Auth.*, 302 AD2d 155 [2002]; *Hitchcock v Boyack*, 256 AD2d 842 [1998]; *N.Y. County Lawyer's Ass'n v State*, 192 Misc 2d 424 [Sup Ct, New York County 2002]).

The Court finds that PDSC may be inequitably affected by a judgment rendered herein, and therefore is a necessary party to these proceedings. Petitioner failed to name PDSC as a co-petitioner, notwithstanding the fact that PDSC is the owner of the real property; its principal ORESTE ALBICOCCO had engaged in negotiations with the Town regarding the potential

easements; and PDSC has submitted affidavits of Mr. Albicocco in support of petitioner's applications and in opposition to the Town's applications. In view of the foregoing, the Town's motion to dismiss for failure to join a necessary party is determined to the extent that the Court directs PDSC be joined as a party petitioner herein (see CPLR 1001[b]; *Red Hook/Gowanus Chamber of Commerce v N.Y. City Bd. of Stds. & Appeals*, 5 NY3d 452 [2005]). If PDSC refuses to join as a co-petitioner herein, then it shall be made a party respondent (see CPLR 1001[a]).

With respect to petitioner's motion to compel the Town to issue building permits and a certificate of occupancy, this application must be **DENIED**. Petitioner, by notice of motion, seeks what is tantamount to a writ of mandamus to compel the Town to act, although it is not denominated as such. The Court notes that proceedings in the nature of mandamus to compel are authorized pursuant to Article 78 (see CPLR 7801; 7803[1]; *Matter of M.K.A. Realty, Inc. v Gervasi*, 17 AD3d 597 [2005]). However, petitioner has not brought such a proceeding in the nature of mandamus to compel. Instead, according to its notice of verified petition, petitioner seeks a judgment vacating "Condition 5" of the Resolution, and remanding the matter to the Planning Board for the filing of a resolution without "Condition 5." Therefore, an Article 78 petition in the nature of mandamus to compel the issuance of building permits and a certificate of occupancy, with the notice requirements attendant thereto (see CPLR 7804[c]), would be the proper procedure to obtain such relief (see *Pius v Bletsch*, 70 NY2d 920 [1987]; *Friends Academy v Superintendent of Div. of Bldg.*, 134 AD2d 497 [1987]). Accordingly, this motion by petitioner is **DENIED**.

In view of the denial herein of the Town's motion to dismiss, the Court directs that petitioner re-notice this petition pursuant to CPLR 7804(f), and that respondents serve and file an answer to the petition within five days after service of the instant Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: April 14, 2008


HON. JOSEPH FARNETI
Acting Justice Supreme Court