

**Incorporated Vil. of Bayville v Viteritti**

2008 NY Slip Op 31533(U)

May 22, 2008

Supreme Court, Nassau County

Docket Number: 0239-05/

Judge: Kenneth A. Davis

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SCAA

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

HON. KENNETH A. DAVIS,

*Justice*

TRIAL/IAS, PART 3  
NASSAU COUNTY

THE INCORPORATED VILLAGE OF BAYVILLE,

Plaintiff,

SUBMISSION DATE: 4/18/08  
INDEX No.: 239/05

-against-

JOHN VITERITTI and MARGUERITE VITERITTI,  
MICHAEL FALZARANO and DIANE J. FALZARANO,

MOTION SEQUENCE # 7

Defendants.

The following papers read on this motion:

- Notice of Motion/Cross-Motion..... X
- Answering Papers..... X
- Reply..... XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Upon the foregoing papers, defendants Michael Falzarano and Diane J. Falzarano's motion for leave to reargue the motions for summary judgment is denied as to injunctive relief but granted as to the Village's right to recoup the cost of abatement.

This is an action for a permanent injunction restraining defendants John and Margueritie Viteritti from obstructing Shore Road, a private street located in the Village of Bayville. The obstruction is a 29 feet long and 4 ½ feet high barricade which is comprised of "decorative boulders," a fence, shrubs, grass, and Belgium blocks. The Viterittis own the property on which the barricade is situated. The barricade was erected by John Viteritti

in 1976.

In its order dated January 29, 2008, the court held that because the Village had not accepted the dedication of Shore Road to public use, it had not become a public street. The court further held that Shore Road had not become a public street by prescription since there had been no public use north of the barricade since 1976. However, the court concluded that the barricade constituted a public nuisance because it was a substantial interference with the health and safety of residents south of the barricade. Since the firehouse is located northeast of the barricade, if a fire occurred on Shore Road south of the barricade, firefighters would have to travel several additional blocks west in order to reach it. Police, ambulance, and other emergency services are also affected. The court further found that the barricade interfered with public access to Shore Road, which would otherwise be unimpeded despite its character as a private street.

The court refused to grant a mandatory injunction, ordering the Viterittis to remove the barricade, because it had not been shown that defendants could remove the obstruction more expeditiously than can the plaintiff. The court issued an injunction, enjoining defendants from interfering with efforts of the Village to remove the barricade, subject to a right of recoupment from the defendants.

Defendants Michael Falzarano and Diane J. Falzarano are the owners of property located at the intersection of Godfrey Avenue and Shore Road, south of the area where the barricade was constructed. The Falzaranos move for reargument of the summary judgment motions to the extent that the court refused to grant a mandatory injunction, ordering the Viterittis to remove the barricade. The Falzaranos also seek reargument to the extent that the court permitted the Village to recoup the cost of removal from property owners other than the Viterittis.

The Falzaranos argue that the court overlooked or misapprehended § 64-12(A)(2) of the Bayville Village Code, which establishes the procedure for maintenance/improvement of a private, or "non-through," village street. The section provides that if 50% of the owners of property abutting the street submit a petition requesting that the street be maintained by a local civic association, the cost of maintenance or improvement may be assessed proportionately against all owners of abutting property. The Falzaranos argue that because the Code does not authorize the Village to undertake maintenance or improvement without a petition signed by the requisite number of owners, the Village may not assess the cost of removing the barricade without a petition requesting its removal. Since a petition has not been submitted, the Falzaranos argue that a mandatory injunction, directing Viteritti to remove the barricade, is appropriate. Alternatively,

the Falzaranos argue that because John Viteritti caused the barricade to be constructed, it would be unjust for the Village to seek recoupment from any other property owner.

The Village notes that § 46-4 of the Bayville Code provides that if a nuisance or condition dangerous to life or health exists on property within the Village, the Mayor shall cause the owner or occupant of the premises to be served with a notice to abate or correct the condition within 24 hours after receipt of the notice. The section further provides that the Mayor may direct the Building Inspector or any other officer of the Village to abate the condition, at the expense of the person served, if he fails to comply with the notice. In its "affirmation in partial opposition," the Village asserts that it seeks to recoup the cost of removing the barricade solely from the Viterittis. The Village supports the Falzaranos' motion for leave to reargue to the extent that the court permitted recoupment from other property owners.

The Viterittis stress that Code § 46-4 requires "every owner, part owner, ...or person interested in any place" to keep the premises in a manner not to be a nuisance. The Viterittis argue that because § 46-4 imposes the obligation to avoid a nuisance on all owners of abutting property, the Village may not assess the cost of abatement on one particular owner. The Viterittis join in the application for reargument to the extent that the court permitted the Village to seek recoupment.

An action by a municipality to abate a public nuisance is equitable in nature (*New York Trap Rock Corp. v. Clarkstown*, 299 NY 77, 82 [1948]). While the municipality's power to bring such an action may be codified in its municipal code, it is an inherent power not dependent upon statutory authorization (*Id* at 84). Because the power of a municipality to recover the costs and expenses of abatement is recognized at common law, it is similarly independent of municipal regulation (*New York v. Basil Co.*, 182 AD2d 307, 308 [1<sup>st</sup> Dep't 1992]). Thus, the court rejects the Falzaranos' argument that restrictions on the Village's right to recoupment contained in the village code militate in favor of a mandatory injunction.

The Viterittis do not join in the branch of the Falzarano's motion seeking reargument as to injunctive relief. Nevertheless, the Viterittis suggest that such relief is inappropriate because the barricade is adjacent to tidal wetlands which are under the jurisdiction of the Department of Environmental Conservation. Pursuant to EC § 25-0401, no person may remove soil from property immediately adjacent to tidal wetland, or conduct any other activity which may substantially impair the wetland's natural condition, unless he has obtained a permit from the Commissioner (*Gordon v. Rush*, 100 NY2d 236, 240 [2003]). Thus, the clearing of vegetation in preparation for removal of the barricade may require an Environmental Conservation permit.

However, EC § 25-0401 further provides that the permit issued by the commissioner "shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located." Thus, the Tidal Wetlands Act is not intended to preempt local land use regulation which is consistent with the policy of the Act (*Town v. Albicocco*, 66 AD2d 886 [2d Dep't 1978]). Moreover, the fact that activity undertaken to abate the nuisance is regulated by the State confirms the appropriateness of allowing the municipality to act rather than compelling abatement by the property owner.

Defendants have failed to show that the court overlooked or misapprehended any matter of fact or law bearing on the appropriateness of injunctive relief. Accordingly, the motion of defendants Michael and Diane J. Falzarano for leave to reargue the summary judgment motions to the extent that the court refused to grant a mandatory injunction, ordering the Viterittis to remove the barricade, is denied.

"[W]hen a local government, in the proper exercise of its delegated powers, summarily abates a public nuisance, it may compel the owner of the property involved to bear the cost of abatement" (*Lane v. Mt. Vernon*, 38 NY2d 344, 349 [1976]). Where there is imminent danger to life, health, or safety, the municipality may compel the property owner to bear the cost even though the owner did not receive prior notice to abate the

nuisance (*4M Holding Co. v. Town Board*, 81 NY2d 1053 [1993]). In the absence of imminent danger, due process requires that the party who is ultimately to bear the cost must be given notice and a reasonable opportunity to abate the nuisance before measures are taken, and costs incurred, by the municipality (*New York v. Basil Co.*, 182 AD2d 307, 304 [1<sup>st</sup> Dep't 1992]).

While the barricade on Shore Road has interfered with fire protection and emergency services for 30 years, there is no imminent danger to life, health or safety. Thus, the Village was required to notify the Viterittis before taking measures to remove it. The court concludes that the Village adequately notified the Viterittis of their obligation to remove the barricade by virtue of the letters from the Village Attorney and the Building Inspector and the application for a mandatory injunction.

The municipality may charge the owner and also make the cost a lien against the property (*McQuillan, Municipal Corporations* § 24.81). The primary purpose in allowing the municipality to seek recoupment is so "the wrong doing or negligent owner shall bear the expense" (*Gregory v. New York*, 40 NY 273, 281 [1869]). Nevertheless, where circumstances warrant, the municipality may also charge the cost to the owner of property which did not harbor the nuisance but benefitted from its abatement (*McQuillan, Municipal Corporations* § 24.81). Where abatement benefits several properties, they all must bear a portion of the cost. Thus, the

municipality must equitably apportion the cost of abatement according to the relative fault and benefit of all effected property owners (*In re Assessment of Water Tax*, 235 AD 566, 568 [3d Dep't 1932]).

Since the Viterittis were the wrongdoers primarily responsible for erecting the barricade, they must be primarily responsible for the cost of removal. However, property owners abutting Shore Road south of the barricade, such as the Falzaranos, will benefit from abatement. While those property owners should pay a smaller share of the cost than the Viterittis, they must nonetheless bear some portion of the expense. If any of the current property owners was a party to the "easement agreement" pursuant to which the barrier was constructed, their share should be proportionately increased. The Village may not arbitrarily shift the cost of abatement from other Shore Road property owners to the Viterittis by the simple expedient of failing to give the other owners notice. Because the Falzaranos waived notice by intervening, they are also responsible for a share of the cost (CPLR § 1013). It is up to the Village in the first instance to determine the relative shares of the cost of abatement to be paid by the respective owners of Shore Road property. Nevertheless, the Village may not assess any owner proportionately more than his equitable share of the cost.

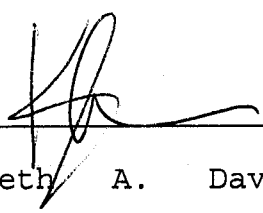
Accordingly, defendants Michael Falzarano and Diane J.

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Falzarano's motion for leave to reargue the motions for summary judgment to the extent that the court permitted recoupment from property owners other than the Viterittis is granted. Upon reargument, the court adheres to its decision granting the Village permission to seek recoupment from owners other than the Viterittis.

This shall constitute the decision and order of the Court.

Dated:           MAY 22 2008          

  
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Kenneth A. Davis, J.S.C.

**ENTERED**  
MAY 27 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE