

**Reuschenberg v Town of Huntington**

2008 NY Slip Op 33560(U)

November 25, 2008

Supreme Court, Suffolk County

Docket Number: 02-11207

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
 I.A.S. PART 24 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER FOX COHALAN  
 Justice of the Supreme Court

MOTION DATE 5-28-08  
 ADJ. DATE 10-24-08  
 MNEMONIC: # 005 - MD

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CHANNING REUSCHENBERG and	:	VINCENT J. TRIMARCO, ESQ.
ROBERT REUSCHENBERG,	:	Attorney for Plaintiffs
	:	1038 West Jericho Turnpike
Plaintiffs,	:	Smithtown, New York 11787-3299
	:	
- against -	:	RIVKIN RADLER, LLP
	:	Attorney for Defendant
TOWN OF HUNTINGTON,	:	926 Reckson Plaza
	:	Uniondale, New York 11556-0926
Defendant.	:	
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Upon the following papers numbered 1 to 83 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-70 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 71-76; Replying Affidavits and supporting papers 77-80 ; Other 81-Deft's Mem/Law; 82-83 Deft's Reply Mem/Law ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (005) by the defendant, Town of Huntington (hereinafter Town), pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiffs, Channing Reuschenberg and Robert Reuschenberg (hereinafter plaintiffs), did not file a Notice of Claim as required by New York Town Law 65(3); abandoned the Town Zoning Board of Appeals (hereinafter ZBA) application and the site plan they are suing upon; the present matter is now moot; and that the plaintiffs have unclean hands, is denied.

It is undisputed that on August 31, 1982 the plaintiffs purchased the 11.419 acres of land that is the subject of this action, then zoned R-40 (residential zoning) and located in the Town in a predominantly industrial zoned area. The deed was recorded on September 10, 1982 in the Office of the Suffolk County Clerk (New York). Located to the east and southeast of the plaintiffs' land, in the Town of Smithtown, New York, is a sand mining company that is zoned for heavy industry. Further southeast of the plaintiffs' land on Old Northport Road are several concrete, masonry supply, sand mining, heavy equipment and concrete crushing businesses. Directly south of the plaintiffs' land is the Town Incinerator and a right of way for the Long Island Rail Road, both zoned I -5 (general industry zoning). The properties located southwest of the plaintiffs' land are used by the Long Island Power Authority as a bus storage depot, zoned I-5. There is residential property to the north of the property.

In 1983, the plaintiffs submitted an application to the Town for a zoning change from R-40 to I-5 to enable them to operate a pre-cast manufacturing business on their land, which

application was denied without explanation. Under Index No. 05164/86, an action was commenced in the Supreme Court of the State of New York by the plaintiffs for declaratory relief and by order of my distinguished colleague Mr. Justice Robert W. Doyle, dated January 15, 1987, it was held that the zoning provisions of the Town's Code were void and of no effect as to the plaintiffs' land and the Town was enjoined from enforcing the zoning provisions against the land owned by the plaintiffs. The Town was further directed to accept and process a building permit from the plaintiffs to enable them to use their land as a pre-cast cement business.

On appeal, the Appellate Division of the Supreme Court, Second Department, on August 29, 1988, affirmed that decision and order, and stated that the zoning provision of the Town's Code was "unconstitutional." Thereafter, on September 26, 1989, the Town resolved to rezone the premises from R-40 to I-1 (light industrial zoning appropriate for warehouse or office use). Later, the Town's 1993 Comprehensive Plan indicated that the plaintiffs' land should be zoned I-5 (general industry zoning). The plaintiffs then applied for a zoning change to I-5, but the Town denied the application and terminated the proceedings. On October 17, 1995, an action in the Supreme Court of the State of New York was commenced by the plaintiffs against the Town under Index No. 24093/95, seeking a declaration that the Town's refusal to rezone the land was unconstitutional and the action sought compliance with the January 15, 1987 judgment as affirmed by the Appellate Division of the Supreme Court, Second Department.

On September 1, 1998, the plaintiffs had their land appraised at \$1,485,000.00 under its I-1 zoning and with the land zoned at I-5, its value would be \$2,965,000.00. There was no property zoned I-1 within the surrounding area. In Findings of Fact and Conclusion of Law on December 10, 1998, this Court ruled that the I-1 zoning of the plaintiffs' land was not in accordance with the Town's 1993 Comprehensive Plan, that the plaintiffs could utilize the property as permitted in an I-5 zoning district, and that the Town was to rezone the plaintiffs' property to I-5. This order was appealed by the Town and on May 6, 1999, the Town commenced an action to restrain and enjoin the plaintiffs' use of the land without municipal permits and approval. Thereafter, a stipulation of settlement was entered into between the parties on October 20, 1999, in which the plaintiffs deeded a conservation easement to create a buffer zone on the north side of the land for the benefit of the residential property in that area, *inter alia*, and the Town agreed to withdraw its appeal pending in the Appellate Division of the Supreme Court, Second Department, and agreed it would cooperate with the plaintiffs and agreed no environmental impact statement would be required.

On November 8, 1999, the plaintiffs applied to the Town for permission to construct a single story commercial building on their land and on November 11, 1999 submitted an Environmental Assessment Form (hereinafter EAF) in support of the application. On February 17, 2000, when the permit application came before the ZBA, the plaintiffs claim that the attorney for the ZBA indicated the permit had already been granted pursuant to the terms of the stipulation of settlement of October 20, 1999. However, on March 21, 2000, the plaintiffs were notified that they needed to obtain a permit to conduct their pre-cast manufacturing business and that a stop-work order had been issued by the Town on February 29, 2000. On April 3, 2000, the Town classified the application as a Type I matter for the purposes of New York State Environmental Quality Review Action (hereinafter SEQRA) and on May 25, 2000, the Town made a Positive Declaration and required the plaintiffs to prepare a Draft Environmental Imposed

Statement (hereinafter DEIS), despite the previous agreement that no environmental impact statement would be required. The Town provided a checklist pursuant to 8 NYCRR 617:21 to narrow the focus of the DEIS, including aquatic ecology and potential recreational uses of the land. The plaintiffs objected, arguing the Town overstepped the reasonable bounds of SEQRA DEIS, especially in light of the order of January 15, 1987 by Mr. Justice Robert J. Doyle. On July 21, 2001, the plaintiffs submitted a DEIS to the Town. On July 10, 2001 the Town Board held a hearing regarding the proposed acquisition of the plaintiffs' land by eminent domain. On August 31, 2001 and October 3, 2001, the Town made several requests for additional DEIS information. On September 25, 2001, the Town Board resolved to acquire the plaintiffs' property by eminent domain and directed the Town Attorney to take all necessary steps (Resolution #599) and referred to a study conducted in 1986 to preserve the land in a natural state to serve as an environmental buffer to the residential property to the north. However, the Town's 1993 Comprehensive Plan recommended that the plaintiffs' land be used for industrial purposes and the plaintiffs, by stipulation of settlement dated October 20, 1999, had already granted an conservation easement to the Town to keep the northern part of the land in an undeveloped state for the benefit of the residential property to the north. The Town then rejected the plaintiffs' proposed DEIS.

In an order, dated May 28, 2003, this Court referred to Mr. Justice Robert J. Doyle's decision of January 15, 1987 in which the Court found for the plaintiffs and declared the zoning chapter of the Town Code to be void and of no effect as to the plaintiffs' property and directed the Town, its agents and employees to accept and process a building permit for the industrial use of the property. In affirming this decision, on August 29, 1988, the Appellate Division of the Supreme Court, Second Department, stated, "The plaintiffs' property is virtually surrounded by industrial operations and the Town offered no acceptable explanation to justify the differential treatment accorded the plaintiff's (sic) property.... The plaintiffs also amply demonstrated a likelihood that they would suffer a substantial loss if the zoning ordinance were allowed to stand.... More over, as in *Jurgens v. Town of Huntington* (citations omitted), the fact that the Town's zoning ordinance is not in accordance with its comprehensive plan is a further indication that the zoning ordinance unjustifiably discriminated against the plaintiffs' property. In light of our determination, the matter is remitted to the Town Board to rezone the plaintiff's property in an appropriate manner."

This Court, in its decision, indicated that the plaintiffs then commenced the within action on April 24, 2002 for specific performance based upon the Town's alleged breach of the stipulation of settlement, dated October 20, 1999, to enjoin the taking of the property by eminent domain and to declare Town Board Resolution #599 of September 25, 2001 null and void, alleging bad faith on the part of the Town. The Town then moved to dismiss the complaint arguing Town Board Resolution #599 did not breach the stipulation of settlement, that the challenge to the resolution was untimely, the Court lacked subject matter jurisdiction and that the action was not ripe for determination. The Town also argued that the stipulation of settlement of October 20, 1999 did not bind the ZBA which had failed to issue a special permit that was required for issuance of the building permit.

This Court, in its decision, dated May 28, 2003, stated that the Town Comprehensive Plan located the plaintiffs' property in the I-5 district. However the Town's response to the directive of

the Appellate Division of the Supreme Court, Second Department, was to rezone the property to I-1, (light industrial zoning appropriate for warehouse or office use) which would not permit the operation of a pre-cast cement business. The plaintiffs then applied for a change of zone from I-1 to I-5, but this application was denied by the Town Board. Again, the plaintiffs sought judicial relief, and by judgment of this Court, dated May 11, 1999, the plaintiffs were permitted to use their property for general industrial purposes as permitted by the Town Code and the Town was directed to accept and process a building permit application for the construction and operation of a pre-cast cement business. The Court continued that, "despite three court orders essentially directing the Town to permit plaintiffs to use their land to operate a pre-cast cement business, the Town brought an action against them for operation without a permit. This action was resolved by a stipulation of settlement which provided for a buffer zone along the northern boundary line; that the Town impose no impediment to the application for a special exception, site plan approval and any other required building or other permits to operate a pre-cast cement business; and that the Town GRANT all necessary permits required to operate the business." The Court also noted that the Town flouted three Court orders and the spirit of the stipulation of settlement and that the January 15, 1987 judgment required that the Town not apply the zoning ordinance to the plaintiffs' property and that it, as well as its agents and employees, process the building permit. The Court also stated that the Town's conduct clearly breached the spirit of the stipulation of settlement, dated October 20, 1999.

The Court also stated that the letter of the law is binding on the Court and originally dismissed the first cause of action to enforce the stipulation of settlement finding that the ZBA's impediment to the issuance of the use permit did not violate the stipulation of settlement, dated October 20, 1999, as the Town Board is a separate entity from the ZBA and the Court has no power to bind the ZBA. However, upon reargument, this Court reinstated the first cause of action by order, dated December 23, 2003. Therefore, the first cause of action remains.

The Court determined that the plaintiffs' second cause of action for specific performance which alleged the Town breached the implied covenant of good faith and fair dealing was viable based upon the Town ZBA striking the plaintiffs' initial application for the special use permit on February 17, 2000 on the grounds that it had been resolved by the stipulation of settlement of October 20, 1999. Therefore, the second cause of action remained.

The third cause of action was dismissed as the January 15, 1987 judgment was not made a part of the stipulation.

The Court determined it was without subject matter jurisdiction concerning the Town Board Resolution #599 to acquire the property by eminent domain and thus dismissed the fourth cause of action, stating that there is nothing in the stipulation of settlement of October 20, 1999 which prevented the Town from bringing an eminent domain proceeding. However, this action may constitute some evidence of bad faith.

The fifth cause of action for counsel fees and expert fees was also dismissed.

The Court then granted the plaintiffs' motion for preliminary injunction on the basis of

plaintiffs' likelihood of success on the second cause of action for breach of the covenant of good faith and fair dealing, and the Town was enjoined from impeding the use of the land to operate a pre-cast cement business.

The defendant Town now seeks summary judgment dismissing the complaint on the basis that the plaintiffs did not file a Notice of Claim as required by New York Town Law 65(3); abandoned the ZBA application and the site plan they are suing upon; the present matter is now moot; and the plaintiffs have unclean hands.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

The Town argues that when the plaintiffs acquired the subject premises it was zoned residential R-40, and subsequent to the purchase, the plaintiffs applied to the Town Board to have the premises rezoned for industrial use. The Town sets forth that after full review, departmental comment, comment from the Suffolk County (New York) Planning Commission and a public hearing, plaintiff's application was denied, resulting in litigation culminating in the decision of the Appellate Division of the Supreme Court, Second Department, dated August 29, 1988, that the plaintiffs' property should not have been zoned for residential use. The Town also argues, however, that it was not instructed as to how the premises should be zoned and instead the case was "remitted to the Town Board to rezone the premises in an appropriate manner." The Town claims it was not directed to reclassify the premises as industrial at all. The Town argues that, on September 26, 1989, the Town Board, pursuant to the decision of the Appellate Division of the Supreme Court, Second Department, adopted a resolution changing the classification of the plaintiffs' premises from R-40 to I-1 (light industrial zoning appropriate for warehouse or office use). For the next five years, the Town claims, the plaintiffs continued to operate their business and, on April 27, 1995, then filed for a change of zone from I-1 to I-5

(general industry zoning). The Town Board, by Resolution #379, denied the plaintiffs' application and the plaintiffs commenced litigation in the Supreme Court of the State of New York challenging the Town Board's denial of the zoning change.

#### NOTICE OF CLAIM AND TOWN LAW §65(3)

There are two remaining causes of action. The first cause of action asserts the defendant Town breached the stipulation of settlement, dated October 20, 1999, by creating impediments to the plaintiffs' use of their land as a pre-cast cement company for which they seek specific performance of said stipulation of settlement. The second cause of action alleges the defendant Town breached the implied covenant of good faith and fair dealing by failing to grant the plaintiffs all permits required for the operation of their pre-cast business on their land pursuant to the said stipulation of settlement of October 20, 1999 and the order of the Appellate Division of the Supreme Court, Second Department, dated August 29, 1988.

The Court notes that counsel for the Town has set forth in his moving papers that "this is an action in specific performance which makes it an action in equity." This Court also determines that the first and second causes of action seek equitable relief.

New York Town Law (hereinafter Town Law) §67. Presentation of claims for torts; action against towns at section 1. provides that "any claim including a claim specified in section sixty-five-a of this chapter which may be made against the town or town superintendent of highways for damages for wrong or injury to person or property for the death of a person, shall be made and served in compliance with section fifty-e of the general municipal law."

New York General Municipal Law §50-e, 1(a) provides in pertinent part that [i]n any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation,..., shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises....

New York General Municipal Law §50-e, 1 provides in pertinent part that [n]o action or special proceeding shall be prosecuted or maintained against a city, county, town, village fire district or school for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district....

Town Law §65(3) provides in pertinent part that no action shall be maintained against a town upon or arising out of a contract entered into by the town unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the town clerk within six months after the cause of action shall have accrued, but no such action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the town clerk.

The Court finds that this action is neither an action sounding in contract nor in tort, and that the defendant Town has failed to demonstrate how a notice of claim is required in this matter

sounding in equity. The Town's argument that a notice of claim is required for any action in contract brought against a Town is frivolous and without basis in law or fact. It is well settled that in an equity action no notice is required to recover monetary damages (***Suburban Club of Larkfield, Inc. v Town of Huntington***, 57 Misc2d 1051, 294 NYS2d 4 [Supreme Court of New York, Special Term, Suffolk County 1968], wherein injunctive relief was sought to restrain the defendant Town from removing or demolishing an air-supported pool dome on the plaintiff's property and from revoking a building permit issued on February 29, 1968 authorizing construction of the dome; (see also, ***Fontana v Town of Hempstead***, 18 AD2d 1084, affd. 13 NY2d 1134; ***Grant v Town of Kirkland***, 10 AD2d 474; ***Jayne v East Hills Water Dist.***, 6 Misc2d 676)

"A chief purpose of a notice of claim statute is to acquaint the municipality with the existence of claims so that they (*sic*) may be investigated before proof grows stale. It enables the governmental unit to examine the claim, lest they (*sic*) be surprised by the initiation of a lawsuit long after meaningful inquiry and defense opportunity has deteriorated. Statutes of this kind are common at all governmental levels, throughout the land. Furthermore, the power to exact compliance is a well settled and entirely acceptable premise of municipal litigation. But where the statutory objective of notice has been fully met by the service of a verified complaint, the statute's bar would serve no legitimate purpose and would merely convert a sensible rule into a blindly technical barrier, depriving a litigant of his day in court" (***Frink v Town of Amenia***, 91 Misc2d 491, 398 NYS2d 331 [County Court of New York, Special Term, Dutchess County 1977]).

The Town has not demonstrated that a notice of claim is applicable to the instant action as both causes of action in the plaintiffs' complaint sound in equity for which a notice of claim is inapplicable. Counsel for the Town indicated in his supporting affirmation that this is an equitable action. It is disingenuous then to argue to this Court that an action for specific performance arising out of a Court ordered stipulation of settlement is a contract giving rise to the facts and circumstances in this case, or that the plaintiffs' causes of action sound in contract, when the Town's counsel concedes this is an action based in equity. The Town is seeking to impose Town Law §65(3) to an action in equity to deprive the plaintiffs of their day in court. Imposition of Town Law §65(3) is not only inapplicable, but serves no legitimate purpose considering the legal history underlying this action.

Therefore, the Town has not demonstrated prima facie entitlement to summary judgment dismissing the complaint because the plaintiffs failed to comply with Town Law §65(3), which the Court, as a matter of law, finds to be inapplicable to the case at bar.

Accordingly, that part of the application by the Town for dismissal of the complaint on the basis that the plaintiff failed to file a notice of claim is denied.

ABANDONMENT OF ZONING BOARD APPLICATION AND SITE PLAN; ACTION IS MOOT;  
AND UNCLEAN HANDS

"A party seeking an equitable remedy must not have unclean hands. The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of

immoral, unconscionable conduct, and even then only when the conduct relied on is directly related to the subject matter in the litigation and the party seeking to invoke the doctrine was injured by such conduct" (**Columbo v Columbo, Jr.**, 50 AD3d 617, 856 NYS2d 159 [2<sup>nd</sup> Dept 2008]). "The unclean hands doctrine rests on the premise that one cannot prevail in an action to enforce an agreement where the basis of the action is 'immoral and one to which equity will not lend its aid' (*Muscarella v Muscarella*, 93 AD2d 993). Thus, one who has executed an agreement to perpetrate a fraud has 'forfeited his right, in law or equity, to protection or recourse in a dispute involving his accomplices in that very scheme'" (*Ta Chun Wan v Chun Wong*, citation omitted)" (**Dillon et al v Dean et al**, 158 AD2d 579, 551 NYS2d 547 [2<sup>nd</sup> Dept 1990]).

"It is a well settled exception to the clean hands doctrine that one who, although at fault, is not equally at fault, will not be denied equitable relief" (see, **Miseveth v Privisjuk**, 85 NYS2d 595). Where there is a confidential relationship between the parties, with one party relying upon the advice of another (**Isaacson v Isaccson**, 28 NYS2d 517), or where 'one party may naturally exercise an influence over the conduct of another' (**Boyd v De La Montagnie**, 73 NY498) '[t]he parties do not stand on equal terms, and the [dominant party] cannot avail himself of the pleas of *particeps criminis* on the part of the [relying party]'" (**Boyd v De La Montagnie**, supra). The attorney client relationship is by definition a "confidential one. The relationship is presumptively unequal and the attorney who counsels a client to behave illegally or fraudulently is more blameworthy than the client who follows such advice. In such a situation of unequal guilt, the plaintiffs will not be barred by the doctrine of unclean hands from seeking equitable relief," (**Dillon v Dean**, supra). In the instant action, it cannot be determined to what extent the failure of the plaintiffs to complete the permit process is due to their own actions or to the actions of the Town, or any combination thereof. A maxim of equity will not be applied for the purpose of defeating equity, with the result that a defendant may not invoke the clean hands doctrine in order to bar judicial scrutiny of his or her own malfeasance, (**Dillon v Dean**, supra).

The Court, noted in its previous order of May 28, 2003, that the Town flouted three Court orders and the spirit of the stipulation of settlement of October 20, 1999. It also noted that the January 15, 1987 judgment required that the Town not apply the zoning ordinance to the plaintiffs' property and that it, as well as its agents and employees, process the building permit. The stipulation of settlement required the Town to grant all necessary permits to operate the business, and two years after the stipulation of settlement of October 20, 1999, instead of granting the permits, the Town resolved to acquire the property by eminent domain, and that the Town's conduct clearly breached the spirit of the stipulation of settlement of October 20, 1999.

In this litigation the Town argues that the plaintiffs have not come to this Court with clean hands. However, the Town has not demonstrated compliance with the previous orders and directives of this Court or the Appellate Division of the Supreme Court, Second Department.

"If the evidence in the record of the culpability of a party seeking equitable relief is by no means unequivocal, then a determination as to whether the party acts with 'clean hands' must await a full presentation of the evidence, including that relative to the nature and extent of any wrongdoing on the part of the opposing party" (**Dillon et al v Dean et al**, supra). As there are factual issues concerning whether the Town has intentionally impeded and frustrated the plaintiffs' attempts to cooperate with the Town, the Town's actions are therefore at issue as well.

The Town has indicated numerous actions by the plaintiffs which the Town concludes constitute unclean hands concerning the use of the subject property and the failure to obtain permits for the activities being conducted on the property. And yet the Town has demonstrated by its own actions, acts which would invalidate its claims that the plaintiffs have unclean hands, that they abandoned the application process, or rendered the instant action moot. There are issues presented by the Town's actions which raise factual questions concerning whether the Town violated the terms of the stipulation of settlement of October 20, 1999, and frustrated the plaintiffs in the application process, potentially indicative of the Town's bad faith.

On May 6, 1999, the Town commenced an action in the Supreme Court of the State of New York under Index No. 10540/99 to enjoin and restrain the plaintiffs from using the premises without the requisite permits and approvals. A temporary restraining order was issued until such time the proper permits were issued by the appropriate Town buildings official, and for the plaintiffs to adhere to a stop work order prohibiting any and all excavating, tree destruction and removal, and building activity. The Town claims that the plaintiffs kept operating, and prior to the filing of a contempt proceeding, on May 11, 1999, by the Town, this Court issued a judgment in the action pending under Index No. 24903/95, directing the Town Board to change the zoning classification of the premises to I-5. The Town now argues the judgment only concerned the zoning reclassification and did not address the operation of a concrete products manufacturing facility. On June 16, 1999, the Town Board appealed to the Appellate Division of the Supreme Court, Second Department.

The Town further states that on October 20, 1999, the Town and the plaintiffs entered into a stipulation of settlement in connection with both then pending actions, wherein the Town agreed to re-classify the premises to I-5 and to process all applications the plaintiffs filed with regard to operating a concrete products manufacturing facility on the premises, and the Town agreed to expedite the same. However, the Town now argues that it never promised to grant any application. The Town states that it could not do so as a zoning contract is not valid in New York and at that time the plaintiffs had still not filed any applications with the ZBA or the Town Planning Board.

The Town asserts neither the ZBA nor the Town Planning Board were parties to the stipulation of settlement of October 20, 1999 and could not be as these Town entities never acted on any application. The Court notes, however, that the plaintiffs' initial application for the special use permit was struck from the calendar of the ZBA by the ZBA itself on February 17, 2000. The Court stated in its order, dated December 23, 2003, that "[t]he court finds that the Town cannot hide behind the ruse that it had not influenced and, or directed the conduct of the Zoning Board." The Court found that the minutes of the ZBA specifically stated that the matter was struck on the advice of counsel because it had been resolved by the stipulation of settlement of October 20, 1999, and counsel for the Town, Thomas Abbate, Esq., stated the ZBA did not have jurisdiction to hear the matter. The Court noted that Thomas Abbate, Esq. was a special Assistant Town Attorney who represented the Town Board in the litigation before this Court, which resulted in the May 11, 1999 judgment directing the Town to accept and process the building permit for the plaintiffs. The Court further stated that "[a] fair characterization of the action at the meeting is that on a motion from the attorney representing the Town Board and advising the ZBA, the ZBA removed the matter from its calendar." Therefore, the Court determined that the second cause of action of the complaint remained viable.

The Court also stated in that order, of December 23, 2003, that paragraph 7 of the stipulation of settlement, dated October 20, 1999, broadly required that the Town agree to provide no impediment to the application for a special exception, and the fact that the application was struck from the ZBA's calendar on the motion of the attorney who served as counsel for the Town certainly raises an issue of fact as to whether the Town did in fact provide an impediment to the issuance of the necessary permit. Therefore, on reargument, the Court reinstated the first cause of action. This decision was affirmed on appeal to the Appellate Division of the Supreme Court, Second Department, and the matter was remanded to the Town Board to rezone plaintiffs' property in an appropriate manner.

In September 1989, the Town Board rezoned the plaintiffs' property to Zoning district I-1 rather than I-5. Zoning district I-5 would have permitted the operation of the pre-cast cement business as of right. Instead of challenging this zoning change as being in violation of the order of the Appellate Division of the Supreme Court, Second Department of August 28, 1988, the plaintiffs sought a second change of zone which ultimately resulted in the May 11, 1999 judgment directing the Town to issue the building permit. The Court further stated that the Town did not refuse to issue the building permit but effectively delayed its issuance because it continued to treat the property as if it were in an I-1 district.

The Town also claims that pursuant to the stipulation of settlement of October 20, 1999, the plaintiffs did file an application with the ZBA seeking a special permit to operate a concrete product manufacturing facility on the southeasterly portion of the premises in accordance with a site plan duly prepared by the plaintiff which included a full EAF Part I, dated February 17, 2000, a report from Cleary Consulting and other documents including a Long EAF and DEIS. On April 3, 2000, however, the ZBA classified the application as a Type 1 action under SEQRA, and held a public hearing on May 2, 2000. Thereafter, on May 23, 2000, despite incomplete submissions to it the ZBA issued a Positive Declaration determining that the plaintiffs' application may have a significant impact on the environment. Drainage plans and landscape plans had not yet been presented, a traffic engineer or real estate appraiser were not retained, and a full site plan was never submitted. In July, 2001, the plaintiffs submitted their DEIS to the ZBA which advised the plaintiffs' attorney that revisions were required. The Town argues that, to date, those revisions have not been submitted, and that the ZBA never denied the plaintiffs' application. Thereafter, the plaintiffs instituted the present action in 2002 involving the two remaining causes of action as set forth above.

Based upon the foregoing, the Court finds that the Town has not demonstrated prima facie entitlement to summary judgment on the issue that the plaintiffs abandoned their application to the ZBA or that they come to this Court with unclean hands, or that plaintiffs' actions have rendered this lawsuit moot. The fact that the plaintiffs have brought this lawsuit and oppose this motion demonstrates they have not abandoned the action or their quest to enforce the stipulation of settlement of October 20, 1999. The Town Board's decision on September 25, 2001 (Resolution 599) to acquire the plaintiffs' land by eminent domain poses a factual issue concerning whether the plaintiffs' have been impeded or intimidated from further pursuing the operation of their business as a pre-cast cement facility, and whether there was any basis for the plaintiffs to proceed with the applications and permits in light of the resolution. There are factual issues concerning whether the Town entered into this agreement knowing full well that the ZBA was not bound by the agreement and thus whether the agreement was entered into in bad faith.

This further raises factual issues as to whether the Town has acted appropriately and whether It has intentionally hindered the plaintiffs' attempts to comply with the ever-changing requirements and increasing document demands, thus precluding any determination by the Court on the record submitted herein that the plaintiffs come to Court with unclean hands, that they abandoned the application for proper permits, or that the action has been rendered moot.

As set forth by the decision of the Appellate Division of the Supreme Court, Second Department, August 28, 1988, "[m]ore over, . . . the fact that the Town's zoning ordinance is not in accordance with its comprehensive plan is a further indication that the zoning ordinance unjustifiably discriminated against the plaintiffs' property. In light of our determination, the matter is remitted to the Town Board of the Town to rezone the plaintiff's (sic) property in an appropriate manner."<sup>1</sup> There are therefore factual issues concerning whether the Town rezoned the plaintiffs' property in an appropriate manner. There are also factual issues concerning whether the reclassification of the plaintiffs' application on April 3, 2000 to Type I for the purposes of SEQRA or the Town Board resolution of September 25, 2001 to exercise eminent domain on the plaintiffs' property, despite the Town's 1993 Comprehensive Plan declaring the property should be zoned I-5, was done with the intent to thwart, frustrate or intimidate and impede the plaintiffs' ability to operate their business and comply with the Town Code and the Town's Comprehensive Plan.

The Town claims that the plaintiffs are sand mining, clearing land (removed twelve trees on the 11.429 acres), storing products and equipment (including unregistered vehicles, concrete products and materials), and also have changed grades, accumulated debris on a "Disturbed Area" and Woodland Area, inter alia, and erected a shed without a permit and certificate of occupancy. This argument by the Town raises further factual issues, as it is noted that the stipulation of settlement of October 20, 1999 only provides for no sand mining on Sundays, with the exception of circumstances constituting an emergency. The Town further agreed to impose no impediment to the application for a special exception, site plan approval and any other required building or other permits for the plaintiffs to operate their pre-cast cement business and agreed to expeditiously review, as reasonably possible, all of plaintiffs' applications submitted to the Town, giving them priority review and consideration. The Town also agreed that the plaintiffs should have the right to store, on site, all equipment, supplies and materials necessary for use in their concrete pre-cast business.

The Town argues that because the plaintiffs have mined sand, stored equipment, etc, and

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<sup>1</sup> In *Reuschenberg et al v Town of Huntington*, 143 AD2d 265, 532 NYS2d 148 [Supreme Court of New York, Appellate Division, Second Department 1988] the Court held that "[t]he fact that a town's zoning ordinance is not in accordance with its comprehensive plan is an indication that the zoning ordinance unjustifiably discriminates" (citing *Jurgens v Town of Huntington*, 53 AD2d 661, 662). The Appellate Division Second Department further stated that "[t]he plaintiff's property is virtually surround by industrial operations and the town offered no acceptable explanation to justify the differential treatment accorded the plaintiffs' property (*Udell v Haas*, 21 NY2d 463). The plaintiffs also amply demonstrated a likelihood that they would suffer a substantial loss if the zoning ordinance were allowed to stand (*Udell v Haas*, supra)."

changed the premises, the present action has become moot. The Town also argues that the plaintiffs' actions are in violation of both the Town Code and Orders of this Court, and that the Town obtained a temporary restraining order, from my distinguished colleague Justice Denise Molia, dated March 6, 2007, requiring the plaintiffs to refrain from engaging in the complained of activity. The Town states there is currently a motion pending for a determination of contempt concerning that Order. It is noted in the Court's computer that this matter was adjourned and is scheduled for an appearance on January 28, 2009. In their affidavits, dated April 17, 2008, by the Town's counsel, Joseph F. Buzzell, Esq. and James Begley, Town Ordinance Inspector, they state that the plaintiffs have taken "some very minor" action towards addressing the alleged debris and unregistered vehicle violations. There are factual issues in that despite three Court orders directing the Town to accept and process the plaintiffs' building permit application for the construction and operation of a pre-cast cement business, so as to permit the plaintiffs to use their land to operate a pre-cast cement business, the Town has denied the applicable building permits which would permit the plaintiffs to comply with the various violations claimed by the Town. It is puzzling to this Court how the plaintiffs can comply with the various ordinances and requirements set forth above, when the plaintiffs are not permitted to build the facilities which would enable the plaintiffs to comply at least in part with the Town's wishes. Instead, the Town argues the plaintiffs are in contempt of the temporary restraining order, raising the factual issue of how the plaintiffs can conduct their pre-cast cement business if the Town acts in a manner rendering it impossible for the plaintiffs to comply with the Town's demands and requirements. The Court notes that, in the Positive Declaration, dated May 25, 2000, submitted by the Town, the "Conclusion" states that "Our determination of significance is not intended to deter the applicants from making any legal use (conditionally or unconditionally permitted) of the property." The Court also notes that, in the transcript of the ZBA meeting on February 17, 2000, the plaintiffs submitted an application for a Special Use Permit to erect a single story commercial building to use in the pre-cast business, which application was stricken from the calendar because, on advice of the Town's counsel, this matter had been resolved by stipulation of settlement between the applicants and the Town and there would not be a public hearing. There are further factual issues concerning why the Town then precluded the plaintiffs from building the structure and categorized the matter as a Type I SEQRA matter on April 3, 2000.

Based upon the foregoing, the Town has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint as the Town has presented many factual issues in its moving papers which preclude summary judgment as a matter of law.

Accordingly, that part of the motion which seeks dismissal of the complaint based upon the assertions that the plaintiffs have abandoned their application to the ZBA, have come to this Court with unclean hands, and by their actions have rendered this action moot, is denied.

Accordingly, motion (005) by the defendant Town for summary judgment dismissing the complaint is denied in its entirety.

Dated: November 25, 2008



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J.S.C.