

Joseph-Hunter v Town of Cairo

2009 NY Slip Op 30000(U)

January 6, 2009

Supreme Court, Greene County

Docket Number: 08-1583

Judge: Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

GALEN JOSEPH-HUNTER and
FREE103POINT9, INC.,

Petitioners-Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-1583
RJI NO. 19-08-3917

THE TOWN OF CAIRO, THE TOWN OF CAIRO
TOWN BOARD, THE TOWN OF CAIRO
PLANNING BOARD, PETER MASSMANN, in his
Official Capacity as Chairman of the Town of Cairo
Planning Board, and RAYMOND PACIFICO,
DANIEL BENIOT, FRANK PAMBIANCHI,
EDWARD FORRESTER, MIKE VILLELA,
ALAN VEVERKA, and TERENCE McSORLEY,
in their Official Capacities as Members of the Town
of Cairo Planning Board,

Respondents-Defendants.

Supreme Court Greene County All Purpose Term, December 19, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioners-Plaintiffs (hereinafter "plaintiffs") commenced this combined action / special

proceeding seeking to annul the written Resolution of the Town of Cairo Planning Board, dated September 3, 2008 (hereinafter “September 3 Resolution”), and seeking damages under 42 USC §§1983 and 1988. Respondents-Defendants (hereinafter “Defendants”) answered the petition/complaint and subsequently moved for summary judgment, which motion was opposed by plaintiffs. Because defendants’ September 3 Resolution was not issued in compliance with the Open Meetings Law (Public Officer’s Law §103) or Town Law §§271(16) and 274-a, the September 3 Resolution is annulled. Additionally, as defendants demonstrated their entitlement to judgment as a matter of law in part, their motion for summary judgment is granted in part and denied in part.

Preliminarily, plaintiffs’ objection to defendants’ submitting their summary judgment motion after answering the petition/complaint, is denied. This Court is mindful of the “strong public policy in having cases resolved on the merits”, especially in the administrative context. (Matter of Castell v. City of Saratoga Springs, 3 AD3d 774, 776 [3d Dept 2004]). It is uncontested that the defendants’ timely served an answer, with affirmative defenses, and a record of proceedings. (CPLR §7804[e]). Defendants were statutorily required to wait until “after issue [had] been joined” in the action portion of this action/proceeding before bringing a motion for summary judgment. CPLR §3212(a). Plaintiffs’ have suffered no prejudice as a result of this method of filing, and have had an opportunity to fully oppose defendants’ motion. As the same standard of review is applicable to both an Article 78 proceeding and a summary judgment motion, this Court will consider the full record submitted in deciding plaintiffs’ Article 78 proceeding and defendants’ summary judgment motion.

“When reviewing a determination rendered by respondent, a court's function is limited to

determining whether it is arbitrary, capricious or irrational.” (Pearlman v. Mills, 24 AD3d 837 [3d Dept. 2005]). Closely related to such determination is whether the agency’s decision was “made in violation of lawful procedure, [or] was affected by an error of law” CPLR §7803(3).

Here, plaintiffs submitted their application and site plan materials for a first appearance before the Town of Cairo Planning Board (hereinafter “the Board”) on November 7, 2007. Thereafter, plaintiffs supplemented their application and materials at subsequent Board meetings. On March 5, 2008 the Board commenced a public hearing on plaintiffs’ application, which was not closed until the Board’s July 2, 2008 meeting. The Board also, at the July 2, 2008 meeting, voted to issue a negative declaration under the State Environmental Quality Review Act (hereinafter “SEQR”). The Board did not vote to accept or deny plaintiffs’ application at the July 2, 2008 meeting, declining to vote on the application until September 3, 2008.

The Board’s September 3, 2008 meeting’s recorded transcript demonstrates that the Board took one vote during their public meeting. A motion was made, by Board member Ververka, and seconded, by Board member McSorley, “to approve the project”. Four “no” votes were lodged and two “yes” votes were lodged. The speaker, after counting the votes, declared that the application was “denied” without explanation.

The Board’s September 3, 2008 meeting was followed by a written resolution, the September 3 Resolution, which does not reflect the recorded transcript of proceedings. While the September 3 Resolution points out that the Board members voted on the motion made by Ververka, set forth above, it adds a vote that was never taken during the public proceedings. The September 3 Resolution sets forth a motion made by Board member Benoit, and seconded by Board member Pacifico, “to deny the application”, which was simply not part of the transcript of

the public proceedings. Nor was the vote “4 Ayes” and “2 Nays” for the motion made by Board member Benoit part of the transcript of public proceedings. Moreover, the affidavits submitted by Board members Benoit and Pacifico fail to address or explain the process whereby they moved, and seconded respectively, such motion. No Board member’s affidavit explains how the vote on the motion “to deny”, as set forth in the September 3 Resolution, was accomplished. However, each Board member’s affidavit acknowledges their oral vote on the motion “to approve” the project, at the September 3, 2008 Board meeting.

The Open Meetings Law requires that “every meeting of a public body shall be open to the general public” (Public Officer’s Law §103[a][an exception is included for “executive session” business which is neither applicable in this matter nor alleged by respondents]), which requires the vote of this Board be open to the public. (See Cipriano v. Board of Zoning Appeals of the City of Glen Cove, 203 AD2d 362 [2d Dept. 1994]). As the vote on the motion “to deny the application”, as set forth in the September 3 Resolution, is not supported by the public record of proceedings herein, it violates the Open Meetings Law. “Courts are empowered, in their discretion and upon good cause shown, to declare void any action taken by a public body in violation of the mandate of [the Open Meetings Law].” (Gernatt Asphalt Products, Inc. v. Town of Sardinia, 87 NY2d 668 [1996][quoting New York University v. Whalen, 46 NY2d 734 [1978]). The “good cause” to void the Board’s September 3 Resolution is the fact that it does not comport with the public transcript of the actual meeting of the Board. Accordingly, the September 3 Resolution is annulled and voided.

Voiding the September 3 Resolution has no effect, however, on the oral vote taken by the Board on September 3, 2008. Such vote of “4 yes” and “2 no”, was made on a motion to approve

the plaintiffs' project. Town Law §271(16) states that "[e]very motion or resolution of a planning board shall require for its adoption the affirmative vote of a majority of all the members of the planning board." (emphasis added) Here, the majority did not affirmatively vote to approve plaintiffs' application but neither was there an affirmative vote to deny the application either. The non-approval does not equate to an "affirmative" denial of the petitioners' application, as no "affirmative" vote to deny was ever taken.

Moreover, the transcript of proceedings clearly demonstrates the Board members oral votes on September 3, 2008 were based upon their applying an incorrect standard of review to plaintiffs' application. Although initially in dispute in this action/proceeding, the parties now agree that Town of Cairo Local Law 1 of the Year 2006, entitled "The Site Plan Review Law", was the standard of review the Board should have utilized in assessing plaintiffs' application at their September 3, 2008 meeting. The Town Board of the Town of Cairo voted to adopt a new site plan review law on July 18, 2008 (hereinafter "new site plan review law"), however, such new law was not filed with the Secretary of State until October 13, 2008. Because a "local law will not become effective until it is filed with the Secretary of State" the effective date for the new site plan review law was October 13, 2008, and was not in effect for the Board's vote on September 3, 2008. (Preble Aggregate Inc. v. Town of Preble, 247 AD2d 697 [3d Dept. 1998]). As the Board incorrectly applied the new site plan review law to the plaintiffs' application during their September 3, 2008 public meeting, and they failed to affirmatively vote to deny plaintiffs' application, this matter is remitted to the Board for further consideration. Upon reconsideration, the Board shall utilize the Town of Cairo Local Law 1 of the Year 2006, entitled "The Site Plan Review Law", to review plaintiffs' application and their "affirmative" vote is required to approve

or deny plaintiffs' application.

The Court of Appeals' decision in Tall Trees Construction v. Zoning Board of Appeals of the Town of Huntington, (97 NY2d 86 [2001]), does not compel a different result. The Tall Trees Construction Court analyzed the specific statutory voting language then contained in Town Law §267-a (applicable to a Town's Zoning Board of Appeals). Here, the voting requirements set forth by Town Law §271, applicable to a Town's Planning Board, applies. Additionally, subsequent to the Tall Trees Construction decision, Town Law §267-a's voting language was amend to modify the voting requirements applicable to a Town's Zoning Board of Appeals. (L. 2002, c. 662, §7, eff. July 1, 2003). Such legislation legislatively abrogated the applicability of the Tall Trees Construction Court's decision. Here, Town Law §271's current voting requirements are wholly distinct from the statutory voting language analyzed by the Tall Trees Construction court, which does not control this determination.

Defendants also move for summary judgment of plaintiffs' fifth and sixth causes of action, which allege claims under 42 USC §§ 1983.

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). A movant fails to meet their burden by merely "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 AD2d 913, 914 [3d Dept.1996]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact with "evidentiary proof in admissible form. . . mere conclusions, expressions of

hope or unsubstantiated allegations or assertions are insufficient.” (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

“In the land use context, 42 USC §1983 protects against municipal actions that violate a property owner's rights to due process, [and] equal protection of the laws...” (Bower Associates v. Town of Pleasant Valley, 2 NY3d 617 [2004]). Substantive due process violations are analyzed under a two part test. “First, claimants must establish a cognizable property interest... [and s]econd, claimants must show that the governmental action was wholly without legal justification” (Id. at 627 [quoting Town of Orangetown v. Magee, 88 NY2d 41 [1996]]). Additionally, “a violation of equal protection arises where *first*, a person (compared with others similarly situated) is selectively treated and *second*, such treatment is based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.” (Id. at 631).

Plaintiffs’ fifth cause of action alleges a due process violation. Plaintiffs allege that their application was effectively granted by operation of the new site plan review law, due to its automatic approval provision. Plaintiffs claim that a “cognizable property interest” was created by such automatic approval, thereby entitling them to protection under the due process clauses of the State and Federal Constitutions. It is now agreed by all of the parties, however, that the new site plan review law was not in effect at the time of the Board’s vote and its automatic approval provision did not apply to plaintiffs’ application. Thus, plaintiffs never possessed their claimed “cognizable property interest”. Moreover, as the Board’s decision on plaintiffs’ application is otherwise discretionary (Town of Pleasant Valley, *supra*) plaintiffs set forth no “cognizable property interest” entitled to due process protection. Accordingly, plaintiffs fifth cause of action

is dismissed.

Plaintiffs' sixth cause of action states a claim based upon due process and equal protection violations, due to the Board's alleged delays in processing, reviewing and voting on plaintiffs' site plan application. "It is axiomatic that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant". (Metichecchia v. Palmeri, 23 AD3d 894, 895 [3d Dept 2005], see CPLR §3212[f]). Here, no discovery has been conducted and plaintiffs allege that discovery is necessary to ascertain whether the Board's actions herein were part of its "official policy or custom, a precondition to a section 1983 action." (Montano v. City of Watervliet, 47 AD3d 1106 [3d Dept. 2008]). Because plaintiffs have not had a reasonable time to conduct and complete discovery, defendants' motion for summary judgment of plaintiffs' sixth cause of action is denied.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: January 6, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated October 7, 2008, Verified Petition/Complaint of Andrew Howard, dated October 7, 2008; with Affidavit of Galen Joseph-Hunter, dated October 7, 2008; with Affidavit of George Schmitt, dated October 7, 2008, and Exhibits A-F; with Appendix Exhibits A-SS.
2. Verified Answer of Michael Murphy, dated October 24, 2007; with Record: Volume I and Record: Volume II Building Department Documents.
3. Verified Reply of Andrew Howard, dated October 30, 2008.
4. Notice of Motion, dated November 25, 2008, Attorney Affidavit of Michael J. Murphy, dated November 25, 2008, with Exhibits A-S.
5. Reply Affidavit of Galen Joseph-Hunter, dated December 11, 2008, Affidavit of George Schmitt, dated December 12, 2008, with attached Exhibits A-F.
6. Reply Affidavit of Michael J. Murphy, dated December 18, 2008, with attached Exhibit A.