

**Haberman v Zoning Bd. of Appeals of the City of
Long Beach**

2009 NY Slip Op 30929(U)

April 20, 2009

Supreme Court, Nassau County

Docket Number: 1138/04

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 23

X

SINCLAIR HABERMAN and BELAIR
BUILDING, LLC,

Petitioners-Plaintiffs,

Index No. 001138/04
Motion Sequence...07
Motion Date... 03/16/09

-against-

ZONING BOARD OF APPEALS OF THE CITY OF
LONG BEACH, LENNY TORRES, MARCEL WEBER,
MICHAEL FINA, STUART BANSCHICK, LORRAINE
DIVONE, MICHAEL LEONETTI, THE CITY OF
LONG BEACH, SCOTT A. KEMINS, as Commissioner
of the Department of Buildings of the City
of Long Beach, SAMUEL UNGAR and XANDER CORP.,

Respondents-Defendants.

X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Reply Affidavit.....X
- Memorandum of Law.....X
- Affirmation.....X

Upon the foregoing papers, as well as the oral argument on the record on
March 16, 2009, the motion by the Petitioners/Plaintiffs (plaintiffs), pursuant to CPLR
3025(b) for leave to amend the petition and complaint herein in the form annexed to the

moving papers is determined as hereinafter provided.

In this action to redress the alleged wrongful revocation of a validly issued building permit, the Plaintiffs now seek leave to serve a third amended petition and complaint to:

- 1) remove Samuel Ungar, former Corporation Counsel of the City of Long Beach, now deceased, as a defendant/respondent;¹
- 2) to add new factual allegations regarding the purported conflict of interest of defendant/ respondent Rocco Morelli, Chairman of the City of Long Beach Zoning Board of Appeals;
- 3) to delete the seventh cause of action for fraud and misrepresentation;
- 4) to add a cause of action [new sixth cause of action] against the City of Long Beach and the Zoning Board of Appeals of the City of Long Beach for temporary regulatory taking.

BACKGROUND

The Respondent-Defendants² oppose the Plaintiffs' motion solely with respect to the proposed addition of a new sixth cause of action wherein the Plaintiffs seek damages arising from the revocation by the Zoning Board of Appeals of a duly authorized building permit issued more than five years earlier to D. Domenico, Ltd., agent for the Plaintiffs. Specifically, the Plaintiffs allege, in the proposed sixth cause of action, that the Zoning Board of Appeals of the City of Long Beach, and the City of Long Beach itself, under the doctrine

¹It appears from the record that the parties agreed in open court to stipulate to remove decedent Samuel Ungar from the case and delete him from the caption.

²Respondent/defendant Xander Corp. takes no position regarding the motion to amend.

of *respondeat superior*, effected the improper taking of their property in or about December 29, 2003, when, in an alleged breach of a court approved stipulation, the Defendants revoked the building permit which had been issued to the Plaintiffs on or about August 12, 2003.

The Defendants maintain that the proposed claim is palpably insufficient both as to the City of Long Beach and the Zoning Board of Appeals. Since the authority to revoke a building permit resides exclusively with the Zoning Board of Appeals, the Defendants correctly argue that the City may not be held liable for a Board's use of that authority. Moreover, even if the decision of the Zoning Board of Appeals to revoke the Plaintiffs' building permit was in error, the Defendants further maintain that an administrative or regulatory mistake by the Zoning Board of Appeals, resulting in delay, cannot give rise to a taking of property. *Lujan Home Builders Inc. v. Town of Orangetown*, 150 Misc2d 547, 549 [Sup. Ct. Rockland Co. 1991].

LEGAL ANALYSIS

The decision whether to allow a pleading to be amended rests within the sound discretion of the court. *Pagan v. Quinn*, 51 AD3d 1299 [3rd Dept. 2008]; *Trataros Const. Inc. v. New York City School Const. Authority*, 46 AD3d 874 [2nd Dept. 2007]. Leave to amend a pleading will be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party. *Shovak v. Long Island Commercial Bank*, 50 AD3d 1118, 1120 [2nd Dept. 2008], *lv to appeal dismissed in part, denied in part* 11 NY3d 762 [2008]; *Lucido v. Mancuso*, 49 AD3d 220, 245 [2nd

Dept. 2008]; *Bolanowski v. Trustees of Columbia University in City of New York*, 21 AD3d 340 [2nd Dept. 2005]. To establish prejudice, which must be significant, there must be some indication that the opposing party has incurred some change in position or hindrance in the preparation of the case which could have been avoided had the original pleading contained the proposed amendment. *Spitzer v. Schussel*, 48 AD3d 233 [1st Dept. 2008].

Initially, it must be noted that it has consistently been held that denial of a building permit is a discretionary exercise of a governmental function for which no liability will fall upon either the municipality or the officials rendering such determination. *154 East Park Ave. Corp. v. City of Long Beach*, 52 NY2d 991, 992 [1981], *cert. denied* 454 US 858 [1981]; *Yan Shou Kong v. Town of Huntington*, 4 AD3d 419 [2nd Dept. 2004]; *Ilson v. Incorporated Vil. of Ocean Beach, N.Y.*, 79 AD2d 697, 699 [2nd Dept. 1980].

The fifth amendment to the United States Constitution³, made applicable to the states by the fourteenth amendment, provides that private property shall not be taken for public use without just compensation. *Smith v. Town of Mendon*, 4 NY3d 1, 4 [2004]. The “takings clause” of the fifth amendment does not prohibit governmental interference with property rights, per se, but, rather, insures compensation in the event government interferences goes too far. *Lingle v. Chevron U.S.A., Inc.*, 544 US 528, 536-37 [2005]. Under a takings claim, the contention is that the state has taken property for a governmental purpose

³Similarly N.Y. Const. Article 1 § 7 provides “a) Private property shall not be taken for public use without just compensation.” Article 1 § 6 provides “No person shall be deprived of life, liberty or property without due process of law.”

or that it has gone “too far” in exercising its police power to regulate property and thus deprive the owner of all economically beneficial use. *Town of Orangetown v. Magee*, 88 NY2d 41, 50 [1996]. Although the quintessential taking scenario involves direct governmental appropriation of, or physical invasion upon, private property, government regulation of private property may, in some instances, be “so onerous that its effect is tantamount to a direct appropriation or ouster—and that such regulatory takings [are] compensable under the fifth amendment. *Lingle v. Chevron, supra* at p. 537, 539. Regulation of private property will effect an unconstitutional taking if it denies an owner an economically viable use of property (a *per se* regulatory taking) or if it does not substantially advance legitimate state interest. *Rent Stabilization Ass’n of New York City v. Higgins*, 83 NY2d 156, 173 [1993].

Notwithstanding the Plaintiffs’ arguments to the contrary, the circumstances herein do not constitute a predicate on which to base a takings claim. While government regulations which limit an owner’s right to possess, use or dispose of property may amount to a taking of the affected property (*Manocherian v. Lenox Hill Hospital*, 84 NY2d 385, 393 [1994], *cert den.* 514 U.S. 1109 [1995], *lv to app den.* 90 NY2d 835 [1997]), an opponent’s utilization of the prescribed judicial mechanism to challenge an administrative determination does not constitute a basis on which to claim a deprivation of plaintiffs’ right to achieve the highest and best use of property as alleged in the proposed third amended petition and complaint. In *Wedinger v. Goldberger*, 71 NY2d 428, 439-440 [1988], *cert den.* 488 U.S.

850 [1988], the Court of Appeals, quoting *Spears v Berle*, 48 NY2d 254, 263 [1979], states that “[a] ‘taking’ can be established only if a permit has been sought and denied and the owner has demonstrated ‘that under no permissible use would the parcel as a whole be capable of producing a reasonable return or be adapted to other suitable private use.’ ” Here, while the Plaintiffs did obtain a permit which they allege was wrongly revoked, it is undisputed that they have never been precluded from developing their property in conformance with the applicable Zoning Code. Part of the delay of which the plaintiffs now complain was the result of a properly issued preliminary injunction on October 16, 2003, prior to revocation of the subject building permit, as well as the Plaintiffs’ own recourse to legal action.

Accordingly, the Plaintiffs’ motion, pursuant to CPLR 3025(b), to amend the petition and complaint herein is granted to the extent that:

Samuel Ungar, formerly Corporation Counsel of the City of Long Beach, is hereby removed as a defendant respondent;

the seventh cause of action for fraud and misrepresentation is hereby stricken;

any additional allegations regarding the purported conflict of interest of Rocco Morelli, the Chairman of the City of Long Beach Zoning Board of Appeals, shall be permitted.

That branch of the Plaintiffs’ motion which seeks to add a new sixth cause of action alleging a regulatory taking is **DENIED** on the grounds that the cause of action is palpably insufficient and devoid of merit under the facts herein.


Accordingly, it is hereby

ORDERED, that the Plaintiff shall serve an amended complaint in compliance with the instant Order upon counsel for the Defendants within twenty (20) days from the date of the entry of this Order, and it is further

ORDERED, that the Defendants shall have twenty (20) days after the service of said amended complaint to interpose its responsive pleading thereto.

This constitutes the decision and order of this court.

DATED: Mineola, New York
April 20, 2009



Hon. Randy Sue Marber, J.S.C.

ENTERED
APR 22 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE