

**Town of Oyster Bay v Kirkland**

2009 NY Slip Op 32327(U)

September 29, 2009

Supreme Court, Nassau County

Docket Number: 004392/2009

Judge: Ira B. Warshawsky

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SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

ENTERED  
IN  
COMPUTER

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 9

TOWN OF OYSTER BAY,

Plaintiff,

INDEX NO.: 004392/2009  
MOTION DATE: 07/13/2009  
MOTION SEQUENCE: 001 and 002

-against-

GALEN D. KIRKLAND as Commissioner of  
the NEW YORK STATE DIVISION OF HUMAN  
RIGHTS and THE NEW YORK STATE  
DIVISION OF HUMAN RIGHTS,

X X X

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmation, Verified Complaint & Exhibits Annexed .....	1
Affirmation in Opposition to Preliminary Injunction of Michael K. Swirsky & Exhibits Annexed .....	2
Notice of Motion, Affirmation & Exhibit Annexed .....	3
Supplemental affirmation in Support of Motion to Dismiss Action of Michael K. Swirsky .....	4
Affirmation in Opposition to Defendants' Motion to Dismiss and in Further Support of Plaintiff's Motion of Joseph O. Giaimo, Genova's Affirmation, Fitzgerald's Affidavit & Giammalvo's Affirmation .....	5
Reply Affirmation of Michael K. Swirsky & Affirmation .....	6

## PRELIMINARY STATEMENT

The Plaintiff moves pursuant to Civil Practice Law and Rules §6301 seeking a declaratory judgment and permanent injunction against Defendant. The Defendant moves to dismiss Plaintiff's complaint pursuant to Civil Practice Law and Rules §3211(a)(7) for failure to state a cause of action.

### BACKGROUND

In 1993 the Plaintiff Town of Oyster Bay, ("Town"), amended its zoning code to allow for the development of below market rate housing for seniors, the Golden Age Housing Project, ("Golden Age"). Selection of applicants for these homes was made in order of the date of the application with preferences given to applicants as follows: (1) school district residents, (2) Town residents, (3) parents of school district and Town residents, (4) Nassau County residents and (5) all others.

In 2004 the Town again amended its zoning code to allow for the development of below market housing for first time home buyers, the Next Generation housing project, ("Next Generation"). Selection of applicants for these homes was done by lottery with preferences given to applicants as follows: (1) Town residents, (2) children of Town residents, and (3) all others.

On January 29, 2009 Defendant New York State Division of Human Rights, ("Division"), on its own motion, filed a complaint charging the Town, and various developers, with discriminatory practices in housing with respect to Golden Age and Next Generation. More specifically, that as a result of existing residential segregation, the residency preferences constitute discrimination in the provision of housing accommodations based on race, color, and national origin.

Plaintiff answered Defendant's complaint and subsequently filed the instant motion seeking declaratory judgment and a permanent injunction restraining Defendant from proceeding with its complaint. Defendants then filed a motion to dismiss Plaintiff's action for failure to state a cause of action.

## DISCUSSION

Plaintiff based its motion for declaratory judgment on the following six causes of action: (1) that the Division lacks standing to bring such a claim; (2) the Town is not one of the entities covered by the Human Rights Law (“HRL”); (3) seeking a permanent injunction of the Division’s investigation; (4) that the Division’s ability to file and investigate claims violates the Town’s due process rights under the 14<sup>th</sup> amendment of the Constitution; (5) that claims of discrimination prior to January 29, 2008 are barred by the statute of limitations; and (6) the Division’s complaint results in reverse discrimination against the Town.

Plaintiff argues that Defendant does not have standing to bring the discrimination claim because HRL §297.1 requires such a claim to be brought by an aggrieved person, and that the Division is not a person as defined in HRL §292(1). Further, Plaintiff argues that while the Division can bring an action on behalf of a person, there is no such person here on whose behalf the action can be brought.

Recognizing that affirmative action in the human rights area is a government function, the Appellate Division has held that “the Division has authority to act upon its own motion regardless of the existence of any individual complainant or complaint”. (*State Division of Human Rights v. Kilian Manufacturing Corporation*, 42 A.D. 2d 391 [4<sup>th</sup> Dept. 1973]) Therefore, the Division may bring an action under the HRL, despite the fact that an individual has not alleged that the Town discriminated against them. As such Plaintiff’s first cause of action is dismissed.

Plaintiff’s argues in its second cause of action that HRL §292.19 and §296.6, which the Division alleges Plaintiff violated, does not apply to it. HRL §292.19 applies to the owner, lessee, sub-lessee, assignee or managing agent of publicly-assisted housing accommodations, while §296.6 applies to those that aid, abet, compel or coerce acts forbidden under HRL. Plaintiff contends that Golden Age and Next Generation are private housing units not publicly assisted housing accommodations, that it has not been involved in the development and sale of the properties other than to amend the zoning laws, and it did not provide tax reductions or benefits to developers for the construction of Golden Age and Next Generation developments. Defendant contends that the allegation is a question of fact for which declaratory relief would be inappropriate.

Plaintiff alleges in its fifth cause of action that the Defendant's claims should be barred by the one year statute of limitation in HRL §297.5. The Town amended its zoning codes first in 1993 and again in 2004. After these amendments the development, construction and sale of Golden Age and Next Generation homes began. The Division contends that the residency requirements have resulted in the continued discrimination in the selection of eligible buyers.

Declaratory relief is generally available in cases where the legality or meaning of a statute is being questioned and no question of fact exists. (*Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143 [1983]). Additionally, the court can decline to hear a matter when other adequate remedies are available, and must dismiss the action if there is another action already pending between the parties than can determine the issues. *Id.*

There currently exists a question of fact regarding whether the Town's actions in facilitating the development of Golden Age and Next Generation are such that the Town is an owner of property or that its residency requirements result in the Town aiding in racial discrimination with respect to the selection of homeowners for the two developments. Even if it were held that no question of fact existed, these issues may be determined at a hearing if the Division, upon completion of its investigation, determines that probable cause exists that racial discrimination took place. Generally, administrative remedies must be exhausted before declaratory relief is granted, unless such administrative remedy would be futile. (*Constantine v. White*, 166 A.D. 2d 59 [3<sup>rd</sup> Dept. 1991]). The initial complaint was filed by the Division in January 2009, and the investigation is still ongoing. It cannot be said that the investigative process has reached a point that administrative remedy would be futile. Therefore, Plaintiff's second and fifth causes of action are dismissed.

Plaintiff argues in its fourth cause of action that the Division's ability to investigate and determine if a party has acted in a discriminatory manner violates Plaintiff's right to due process under the 14<sup>th</sup> Amendment of the Constitution. The fact that a single agency is involved in the investigation and adjudication of a matter is not, ipso facto, a denial of a parties due process rights. (*Matter of Berncolors-Poughkeepsie, Inc. v. City of Poughkeepsie*, 96 A.D. 2d 595 [2<sup>nd</sup> Dept. 1983]). In its analysis the court noted that the hearing officer who heard the complaint had not been involved in the investigation or prosecutorial actions of the matter. *Id.* Similarly, in *Matter of Siddiqui v. New York State Department of Health*, 228 A.D. 2d 735 (3<sup>rd</sup> Dept. 1996),

the Court found that “no bias or prejudice can be inferred solely due to the overlapping investigatory and adjudicatory roles assumed among members of the same agency in the absence of proof of actual bias or prejudice”.

Here the discrimination claim against the Town was initiated by Division employees, then forwarded to the Regional office, which had no role in bringing the charges, to investigate. While the investigation is still ongoing, should the Regional Director determine that there is probable cause that a HRL violation exists, the matter will be forwarded for a de novo hearing held by an impartial administrative law judge. So even though the claim began and is being investigated by the same agency, the final determination will be made by an independent party. As a result the Plaintiff’s due process rights have not been violated and its fourth cause of action is dismissed.

Plaintiff’s third cause of action seeks a preliminary injunction enjoining the Defendant from proceeding with its investigation of alleged discriminatory practices by Plaintiff. Plaintiff contends that the continuation of the claim will force the Town to halt the development of the Golden Age and Next Generation projects thereby depriving seniors and first time home buyers of low cost housing for years while the administrative process runs its course.

Generally, a preliminary injunction will be granted where the defendant is about to do something in violation of the plaintiff’s rights thereby rendering a judgment ineffectual. (*Nobu Next Door, LLC v. Fine Arts Housing Inc.*, 4 N.Y. 3d 839 [2005]). The party seeking the preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction, and a balance of equities in its favor. *Id.*

As previously discussed, the Defendant has standing to bring the action, has not violated Plaintiff’s due process rights, and questions of fact exist which should be resolved during the administrative process. As a result Plaintiff has failed to show the probability of success necessary to grant the injunction.

With respect to irreparable harm, the Plaintiff argues that if the injunction is not granted the development projects will be halted while it expends time, energy and money to defend itself against the allegations. Defendant counters that it hasn’t yet ordered a hearing since its investigation is still ongoing and that it cannot stop the Golden Age or Next Generation projects until, and unless, it finds that the Town violated the HRL.

It has been held that the danger of impending judicial proceedings is not an injury justifying an injunction. (*Boyle v Pogs Construction Corp*, 74 Misc. 2d 307 [Sup. Ct. Suffolk Co., 1973]). Since potential litigation costs are the only harm Plaintiff is subject to Plaintiff has not shown the irreparable harm necessary to grant the injunction. Therefore, Plaintiff's third cause of action is dismissed.

Plaintiff's sixth, and final, cause of action alleges that the Division's complaint is based on a racial number-counting analysis that results in reverse discrimination against the Town. Plaintiff argues that the Division's complaint is based strictly on the percentage of whites to non-whites rather than on a complaint from an individual who feels he or she has been discriminated against, actions which do not satisfy review under the doctrine of strict scrutiny.

A party seeking to prove housing discrimination may demonstrate that the "defendant's actions had a discriminatory effect either through an adverse impact on a particular minority group" or through "harm to the community generally by the perpetuation of segregation". (*Huntington Branch, NAACP v. Town of Huntington*, 844 F. 2d 926 [2d Cir. 1986]). Similarly, it has been held that preferences in awarding public housing that "facially favors the residents of [predominantly white] communities will disproportionately favor whites over minorities in the long run" may violate the law. (*Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33 [D. Mass. 2002]).

Defendant's complaint seeks to insure that the selection process applied to Golden Age and Next Generation housing does not have the effect of perpetuating segregation. It is the Division's contention that in order to do so, the residency preferences should be eliminated, not that a set number of units be allotted to minorities. As such, the Division complaint does not result in reverse discrimination and Plaintiff's sixth cause of action is dismissed.

As a result of the above analysis, Plaintiff has failed to state a cause of action for which relief may be granted. Therefore, Defendant's motion for summary judgment is granted.

### CONCLUSION

For the foregoing reasons Plaintiff's motion is denied and Defendant's motion is granted. Defendant is entitled to judgment dismissing the complaint in its entirety.

Submit Judgment on Notice.  
This constitutes the Decision and Order of the Court.

Dated: September 29, 2009

*Isa B. Warshawsky*

J.S.C.

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**ENTERED**  
OCT 02 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE