

Matter of Levine v Village of Is. Park Bd. of Zoning Appeals

2009 NY Slip Op 32587(U)

September 30, 2009

Supreme Court, Nassau County

Docket Number: 4699/09

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 6
NASSAU COUNTY**

In the matter of the application of GARY LEVINE

Petitioner,

For a judgment pursuant to CPLR Article 78,

MOTION SEQ NO.: 001, 002, 003

-against-

MOTION DATE: 6/16/09

**THE VILLAGE OF ISLAND PARK BOARD OF
ZONING APPEALS and THE ISLAND PARK
VILLAGE BOARD OF TRUSTEES**

INDEX NO.: 4699/09

Respondents.

The following papers having been read on the petition (numbered 1-4):

Notice of Petition.....1
Notice of Motion to Dismiss.....2
Notice of Cross Motion.....3
Reply Affirmation.....4

This decision determines the following:

Motion Seq. 001. Petition for an order pursuant to **CPLR Article 78 annulling the decision of the respondent VILLAGE OF ISLAND PARK ZONING BOARD OF APPEALS dated February 17, 2009 granting certain variances for the construction of a one-family dwelling on the subject property; and declaring the Action and Resolution by the ISLAND PARK VILLAGE BOARD OF TRUSTEES on August 16, 2007, authorizing the sale of the subject property, to be null and void and of no effect, as well as any contract or conveyance of any part thereof;**

Motion Seq. 002. Motion to dismiss pursuant to **CPLR §7804(f); and**

Motion Seq. 003. Cross-motion by petitioner reiterating the request for relief sought in Motion Seq. 001; or in the alternative, granting petitioner leave to file an amended petition naming and serving any necessary party as determined by the Court.

On August 16, 2007 the BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF ISLAND PARK, sued herein as THE ISLAND PARK VILLAGE BOARD OF TRUSTEES (the "BOARD OF TRUSTEES"), adopted a resolution (the "2007 Sale Resolution") approving the sale of Village property located at 15 Pershing Place, Island Park, New York (the "Property") to Banick Construction Inc. and authorizing the Mayor to proceed with the conveyance. Pursuant to the 2007 Sale Resolution, on or about September 26, 2007 the Mayor executed a contract for the sale of the Property (the "Contract of Sale") to Joseph Balabanick ("Balabanick"), the principal of Banick Construction Inc. The sale was subject to the granting by THE VILLAGE OF ISLAND PARK BOARD OF ZONING AND APPEALS (the "BZA") of the variances required for the construction of a new single family dwelling on the Property. By application dated December 31, 2007, Balabanick filed for variances for height, lot area, lot coverage, front yard setback and rear yard setback to permit the construction of a new single family dwelling on the Property. By decision dated February 17, 2009 (the "2009 Variance Determination"), the BZA granted the variance application, subject to the conditions set forth therein.

On March 13, 2009, the petitioner GARY LEVINE, an owner of property adjacent to the Property, filed the within Article 78 proceeding seeking an order annulling the 2009 Variance Determination and declaring the 2007 Sale Resolution to be null and void. Petitioner also seeks an award of damages.

Petitioner challenges the sale of the Property to Balabanick on two main grounds: (i) that the sale was an unlawful alienation of parkland property; and (ii) that the sale to Balabanick is an *ultra vires* act, insofar as the 2007 Sale Resolution authorized conveyance of the Property only to Banick Construction Inc., and not to its individual principal. The crux of Petitioner's challenge to the 2009 Variance Determination is that the BZA failed to properly apply the criteria set forth in **Village Law §7-712-b(3)**. Petitioner also asserts, in effect, that Balabanick had no standing to apply for the variances insofar as he was not the authorized contract vendee for the Property. As a procedural matter, Petitioner argues that the 2009 Variance Determination was untimely and in violation of **Village Law §§ 7-712-a(8) and 7-712-a(12)** insofar as it was rendered eleven months after the first public hearing on March 26, 2008 and nine months after the second public hearing on May 28, 2008.

Respondents have moved to dismiss the petition pursuant to **CPLR §7804(f)** on the grounds that: (i) the Petition fails to name a necessary party, namely the contract vendee Balabanick; (ii) the Petition fails to state a cause of action with respect to the 2009 Variance Determination; and (iii) the challenge to the 2007 Sale Resolution on grounds that the sale of the Property was an unlawful alienation of parkland was not an issue

before the BZA and, in any event, is not a proper subject for an **Article 78** proceeding, but rather must be determined in the context of a declaratory judgment action.

As a threshold matter, the Court must determine whether or not Balabanick is a necessary party, and whether or not the failure to name him as a respondent requires dismissal of the petition. “[O]n a motion to dismiss a petition upon an objection in point of law, all of the allegations contained in the petition are deemed to be true ... and the facts contained in the petition must be considered in their most favorable light.” **Manupella v Troy City Zoning Board of Appeals**, 272 AD2d 761, 762 quoting **Matter of Parisella v Town of Fishkill**, 209 AD2d 850, 851.

A person whose interest may be affected by a potential judgment must be made a party in an **Article 78** proceeding. **Caltagirone v Zoning Board of Appeals**, 49 AD3d 729. See **CPLR 1001(a)**. “The owner of real property subject to a variance challenge generally is a necessary party because the owner will be inequitably and adversely impacted if the zoning board decision were annulled . . . A party who proposes to purchase and develop real property also may be a necessary party for the same reasons.” **Manupella**, 272 AD2d at 763 (citations omitted). See also **Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd of Standards and Appeals**, 5 NY3d 452 (real estate owner/developer was necessary party in proceeding to overturn grant of variance).

The Court finds that Balabanick, as “a party who proposes to purchase and develop” the Property and contract vendee pursuant to the Contract of Sale, is a necessary party, insofar as his interest in the Property may be inequitably and adversely affected by the granting of the relief sought by petitioner. See **Manupella**, 272 AD2d at 763. If the 2009 Variance Determination and 2007 Sale Resolution were nullified, Balabanick would be prevented from purchasing and developing the Property as planned.

Although non-joinder of a party who should be joined under **CPLR §1001(a)** is grounds for dismissal pursuant to **CPLR §1003**, the Court must first consider whether or not the necessary party can be joined and dismissal avoided. See **CPLR §1001(a),(b)**; **Red Hook**, 5 NY3d at 459; **Romeo v NY State Dep’t of Education**, 41 AD3d 1102. “If an absentee who is necessary to the action is subject to the court’s jurisdiction, that absentee must be joined; if the absentee is not subject to jurisdiction, the court must consider several factors to determine whether the action should be dismissed or should proceed in the absence of the necessary party”. **Romeo**, 41 AD3d at 1104.

Respondents assert that the proceeding must be dismissed because Balabanick cannot be joined at this time. An **Article 78** proceeding to annul the decision of the BZA

must be commenced within thirty (30) days after the filing of the decision in the office of the Village Clerk. **Village Law §7-712-c(1)**. Insofar as the 2009 Variance Determination was filed on February 26, 2009, the 30-day limitations period has long since expired. Respondents argue that petitioners cannot avail themselves of the doctrine of “relation back” insofar as there is no unity of interest between Balabanick and the BOARD OF TRUSTEES or BZA. See **Red Hook**, 5 NY3d at 457. Applying the five (5) factors enumerated in **CPLR §1001(b)**, respondents maintain that the proceeding cannot continue in the absence of Balabanick.

The Court disagrees. First, respondents’ analysis does not apply to that portion of the instant proceeding which challenges the 2007 Sale Resolution on the ground that it constitutes an unlawful alienation of parkland. Respondents themselves maintain that this cause of action cannot be considered in the context of an Article 78 proceeding, but must be addressed in the context of a plenary action for a declaratory judgment. See **Jones v. Amicone**, 27 AD3d 465. If the cause of action cannot properly be raised in an Article 78 proceeding, then the limitations period applicable to Article 78 proceedings does not apply. The cause of action is governed by the six year “catch-all” limitations period set forth in **CPLR §213(1)**, which has not yet expired. See **Jones**, 27 AD3d at 469; **American Ind. Paper Mills Supply Co., Inc. v County of Westchester**, 16 A.D.3d 443.

More fundamentally, however, the Court finds that the lapse of the statute of limitations is not a bar to the joinder of a necessary party pursuant to **CPLR §1001**. In the past, New York courts and commentators have assumed that the practical inability to join a necessary party due to the expiration of the statute of limitations was equivalent to the party being beyond the court’s jurisdiction. The Court of Appeals had left the issue open, proceeding directly to a discretionary determination pursuant to **CPLR §1001(b)** as to whether or not the action could continue without the necessary party. See **Red Hook**, 5 NY3d at 459. Last year, however, the Court of Appeals resolved the matter, concluding that an expired statute of limitations was *not* the equivalent of a jurisdictional defect. **Windy Ridge Farm v Assessor of the Town of Shandaken**, 11 NY3d 725. “[A] statute of limitations does not deprive a court of jurisdiction nor even a litigant of a substantive right, but is merely a defense which may, if properly asserted, deprive a plaintiff of any remedy from a defendant.” **Windy Ridge**, 11 NY3d at 727, quoting **Romeo**, 41 AD3d at 1104. In most cases, even if the statute of limitations has expired, the court is required to join the necessary parties and remit for further proceedings. **Id.**

The Court therefore determines that Balabanick is a necessary party who must be joined as a respondent prior to any further determination by the Court. The Court notes that if it is determined that the challenge to the 2007 Sale Resolution must proceed in the form of a declaratory judgment action, then this challenge may be considered a separate

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and distinct cause of action which is governed by a six-year statute of limitations, and it may be litigated together with the challenge to the 2009 Variance Determination in a single hybrid proceeding. See *Jones*, 27 AD3d at 470. See also *Matter of New York State Assemblyman Powell, IV v City of New York*, 16 Misc.3d 1113(A) and cases cited therein.

Based upon the foregoing, it is

ORDERED, that the relief sought in the Petition (Seq. 001) is **denied**, without prejudice. It is further

ORDERED, that the motion to dismiss pursuant to CPLR §7804(f) (Seq. 002) is **denied**. It is further

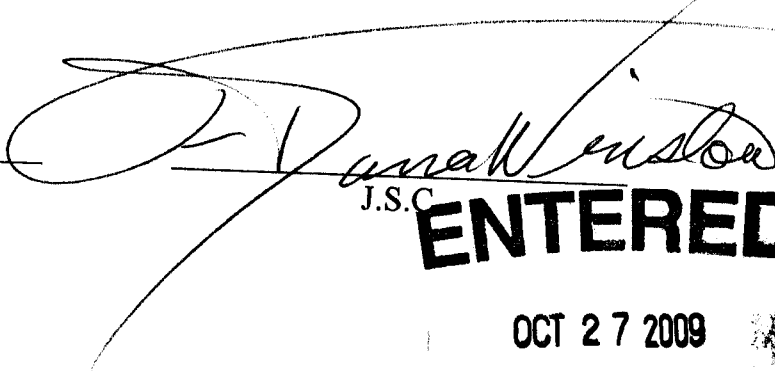
ORDERED, that the cross-motion is **denied in part and granted in part**. It is **denied**, without prejudice, to the extent that it seeks the relief sought in the petition; it is **granted**, to the extent that it seeks leave to file an amended petition naming Balabanick as a respondent. Within thirty (30) days following entry of this Order in the records of the County Clerk: (1) Petitioner shall file an amended petition naming Balabanick as a respondent; (2) Petitioner shall serve the amended petition, together a copy of this order and all papers upon which it is based, upon Balabanick pursuant to CPLR §308(1) or (2); and (3) Petitioner shall serve the amended petition, together with a copy of this Order, upon all other parties in the same manner as permitted for service of motion papers. It is further

ORDERED, that all respondents must file and serve an answer to the amended petition within thirty (30) days following completion of the above-described service.

This constitutes the Order of the Court.

Dated

9/30/09


J.S.C.

ENTERED

OCT 27 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**