

State of New York v Village of Kings Point

2009 NY Slip Op 33338(U)

November 18, 2009

Sup Ct, Nassau County

Docket Number: 17908/09

Judge: Thomas Feinman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

STATE OF NEW YORK,

Plaintiff,

- against -

VILLAGE OF KINGS POINT,

Defendant.

TRIAL/IAS PART 18
NASSAU COUNTY

INDEX NO. 17908/09

MOTION SUBMISSION
DATE: 10/9/09

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Memorandum of Law X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

RELIEF REQUESTED

The plaintiff, by way of Order to Show Cause, obtained a Temporary Retraining Order (TRO) on September 2, 2009 from the Honorable Justice Woodard, whereby, pending the hearing on plaintiff's motion, then returnable September 9, 2009, the defendant, its officers, employees, contractors, agents and assigns, were enjoined from taking any actions to advance and implement the subject project to construct or expand certain Village Department of Public Works facilities including (i) engaging in any site preparation or construction, (ii) cutting or removing trees or other flora, excavating, earth-moving, clearing, grading, (iii) any other physical alteration of land or natural resources, and (iv) erecting any structure or appurtenance in furtherance of said project in the approximately 5.455-acre site situated in the western corner of Kings Point Park, Kings Point Road, north of Steamboat Road, at the northern terminus of Crestwood Place, Kings Place, and Park Place, and south of the eastern terminus of Sunset Road, in the Village of Kings Point, Nassau County.

The Honorable Justice Woodard, by separate Short Form Order dated September 2, 2009, issued an order, on the consent of both counsel, granting their application, "to have the within matter transferred to Justice Feinman based on a related matter currently pending before Justice Feinman".

Thereafter, this Court, modified the prior Order to Show Cause, upon oral argument held on October 9, 2009, to the extent that the TRO would be in effect pending the "determination" of plaintiff's motion, and this Court further ordered that the amount of undertaking be set pursuant to CPLR §2512(1), \$1,000,000.00, One Million Dollars.

The plaintiff moves by way of Order to Show Cause for the TRO as indicated above. The defendant cross-moves for an order pursuant to CPLR §3211 dismissing plaintiff's complaint on the grounds that the causes of action in the complaint are barred by the statute of limitations and doctrine of laches. The plaintiff submits a Memorandum of Law in opposition to the cross-motion and in further support of plaintiff's motion. The defendant submits a reply Memorandum of Law in further support of defendant's cross-motion.

BACKGROUND

In the prior related action entitled *Capruso, et al. v. Village of Kings Point*, bearing Index No. 5006/09, private residents residing near Kings Point Park, (hereinafter referred to as the "park"), moved for a preliminary injunction enjoining the defendant, the Village of Kings Point, (hereinafter referred to as the "Village"), from (a) proceeding with a Department of Public Works, ("DPW"), facility project, (b) granting any approvals or authorizations for the project, (c) soliciting any bids for or entering into any contracts for the construction of the DPW facility, (d) engaging in any physical destruction, site preparation and/or construction, including but not limited to the removal of trees and earth moving, clearing, grading, altering or any other activities in the Western Corner of the park, unless and until specific and direct approval is obtained from the State Legislature. The defendant, the Village, cross-moved for an order pursuant to CPLR §3211 dismissing plaintiff's complaint, and submitted a Memorandum of Law in support of defendant's cross-motion.

This Court, by way of decision dated July 29, 2009, found that the plaintiffs made a *prima facie* showing of entitlement to a preliminary injunction and denied defendant's cross-motion to dismiss plaintiff's complaint.

DISCUSSION

The plaintiff herein, the State of New York, seeks a TRO to enjoin the Village, its officers, employees, contractors, agents and assigns, from conducting any land clearing, excavation or construction activities or any other type of activity in furtherance of a Village DPW project that would expand an existing DPW facility on an approximately 5.4-acre parcel of designated parkland, (the "Western Corner"), in the park. The plaintiff provides that as the plaintiffs in the *Capruso* action were unable to post the undertaking, the amount of Four Hundred Thousand and 00/100 Dollars, (\$400,000.00), as provided in this Court's decision dated July 29, 2009, thereby causing "lapse" in the injunction order. The State provides that it now moves, by way of Order to Show Cause, due to the eminent detriment of the people of the State for whose benefit dedicated parkland is held in trust, as the State has a significant interest, and as so, the State has filed the instant action to maintain the *status quo* pending in the related *Capruso* action.

The Village submits that it "moves to dismiss and opposes the plaintiff's motion on the *same grounds* on which it cross-moved and opposed the similar motion of the plaintiffs in *Capruso, et al. v. Village of Kings Point, et al.*, Index No. 5006/09, decided by this Court in its short form order of

July 29, 2009" (emphasis added). The Village also argues that the restraints of this Court's prior order of July 29, 2009 are unnecessary, in that while the plaintiff has a valid interest in the restraint in the physical destruction, site preparation, construction, removal of trees and earth moving, clearing, and grading, altering, the "[p]lanning, soliciting bids, entering into contracts, granting authorizations, or granting approvals simply has no impact on the premises or its use or enjoyment by anyone".

The Village's cross-motion seeking dismissal is denied as the Village is precluded from relitigating the exact issues it previously argued which have been decided in the prior *Capruso* matter. The Village argued the exact identical issues in *Capruso* as it argues herein, whereby the Village had a full and fair opportunity to litigate such issues. (*Ryan v. New York Telephone Co.*, 62 NY2d 494; *Schwartz v. Public Administrator of County of Bronx*, 24 NY2d 65; *Westchester County Corrections Officers Benevolent Association, Inc. v. County of Westchester*, 2009 NY Slip Op 6683, (2d Dep't, Sept. 22, 2009).

In any event, the State has made a *prima facie* showing of entitlement to the preliminary injunction that it seeks, and therefore, the State's motion, by way of Order to Show Cause, is granted, and based upon the foregoing, the defendant's cross-motion for dismissal is denied.

Accordingly, it is hereby

ORDERED that the Village, its officers, employees, contractors, agents and assigns, are enjoined from taking any action to advance or implement the subject DPW project, or construct or expand the DPW project, from engaging in any site preparation or construction, from cutting or removing trees or other flora, excavating, earth-moving, clearing, grading, from any other physical alteration of land or natural resource, and from erecting any structure or appurtenance in furtherance of the DPW project in the approximately 5.455-acre site situated in the western corner of the park, east of Kings Point Road, north of Steamboat Road, at the northern terminus of Crestwood Place, Kings Place and Park Place, and south of the eastern terminus of Sunset Road, in the Village of Kings Point, Nassau County, and it is hereby further

ORDERED that the parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 2nd day of December, 2009, at 9:30 A.M. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

ENTER:


J.S.C. **ENTERED**

Dated: November 18, 2009

cc: Andrew M. Cuomo, Attorney General of the State of New York
Ackerman, Levine, Cullen, Brickman & Limmer, LLP

NOV 19 2009
**NASSAU COUNTY
COUNTY CLERK'S OFFICE**