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SHORT FORM ORDER

INDEX No. 18932/09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/31/09
ADJ. DATES 11/20/09
Mot. Seq. # 014 - MD
Mot. Seq. # 015 - MD

LONG ISLAND PINE BARRENS SOCIETY, INC., RICHARD AMPER as Executive Director, OPEN SPACE COUNCIL, INC., MARILYN ENGLAND, as President, MARY ANN JOHNSTON, PAUL McCOY, EDWARD KACHERSKI, LORENZ AND BRENDA VOGEL, as citizens, residents, taxpayers and property owners,

Petitioners,

-against-

TOWN OF BROOKHAVEN TOWN BOARD and SANDY HILLS, LLC,

Respondents.

REGINA SELTZER, ESQ.
Atty. For Petitioners
30 Brewster Ln.
Bellport, NY 11713

CERTILMAN, BALIN, ADLER & HYMAN
Attys. For Resp. Sandy Hills, LLC
1393 Veterans Memorial Hwy.
Hauppauge, NY 11788

GOLDSTEIN & AVRUTINE, ESQS.
Attys. For Resp. T/O Brookhaven Town Bd.
575 Underhill Blvd.
Syosset, NY 11791

Upon the following papers numbered 1 to 26 read on this motion for preliminary injunctive relief and motion to amend pleadings; Notice of Motion/Order to Show Cause and supporting papers 1-9; 18-20; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-11; 12-13; 14-15; 21-22; 23-24; Replying Affidavits and supporting papers 25-26; Other 16-17 (memorandum); ~~and after hearing counsel in support of and in opposition to the motion~~) it is,

ORDERED that the respondents' request for oral argument is considered under 22 NYCRR § 202.8 and is denied; and it is further

ORDERED that this motion (#014) by the petitioners for preliminary injunctive relief restraining the Planning Board of the Town of Brookhaven from continuing to undertake site plan review of an application submitted by the respondent, Sandy Hills, LLC, is considered under CPLR Article 63 and is denied; and it is further

ORDERED that the petitioners' separate motion (#015) for an order granting leave to add a new party respondent, is denied.

In May of 2009, the petitioners commenced this proceeding against the Town Board of the Town of Brookhaven and Sandy Hill, LLC for a judgment annulling and reversing the April 16, 2009 resolution of the respondent Town Board which granted an application by respondent, Sandy Hill, LLC. to re-zone a 39 acre parcel of real property situated in Middle Island, from Residence 1 and J Business 2 to Mf Residence and J Business 6. The petitioners are neighboring landowners and environmentalists who oppose the multifamily residence and mixed use of the subject premises proposed by Sandy Hill, LLC. The filed petition, which was noticed to be heard on June 30, 2009, was returnable before another Justice of this court. After the recusal of that Justice and four others Justices of this court, this proceeding was randomly re-assigned to the undersigned in November of 2009.

On November 20, 2009, the petitioners' motion for preliminary injunctive relief (re-numbered as motion seq. #014) was marked submitted for determination by this court. By such motion, the petitioners seek to preliminarily enjoin the Planning Board of the Town of Brookhaven, a non-party to this proceeding, from reviewing and determining the application for site plan approval submitted by respondent, Sandy Hills, LLC (hereinafter Sandy Hills) in connection with the subject premises. It appears from the record that site plan approval from the Town of Brookhaven Planning Board (hereinafter Planning Board) is necessary to develop the subject premises in the manner proposed by Sandy Hills, whose application to re-zone the premises so as to permit such development is the subject of this proceeding. This motion was interposed by an Order to Show Cause which was granted on August 19, 2009 (Kent, J.). It contained a stay prohibiting the Planning Board from undertaking review of the site plan application submitted by respondent Sandy Hills, pending the return date of the motion.

Attached to the August 19, 2009 Order to Show Cause (Kent, J.) was an "Amended Petition" by which the petitioners attempted to add the Planning Board as a party respondent to this proceeding and to add a cause of action against it for relief in the nature of prohibition and temporary restraints and stays. The day following the issuance of the August 19, 2009 Order to Show Cause (Kent, J.), the petitioners separately moved by notice of motion (motion seq. #015) for an order directing that the Planning Board be joined as a necessary party respondent. This second motion also appeared on this court's November 20, 2009 motion calendar and was marked submitted on that date.[1] For the reasons set forth below, both motions by the petitioners are denied.

Traditional notions of due process generally prohibit the granting of relief against persons who have not been joined as parties to the action in which such relief is requested (*see* ***Royal Zenith Corp. v Continental Ins. Co.***, 63 NY2d 975, 483 NYS2d 993 [1984]; ***Riverside Capital Advisors, Inc. v First Secured Capital Corp.***, 28 AD3d 457, 814 NYS2d 646 [2d Dept 2006]). Injunctive relief, which is considered drastic when granted in advance of a final judgment, is thus available only in statutorily prescribed actions pending against parties who have been jurisdictionally joined (*see* CPLR 630; 6311; ***Incorporated Vil. of Atl. Beach v Pebble Cove Homeowners' Assn.***, 139 AD2d 627, 527 NYS2d 429 [2d Dept 1988]). Under limited circumstances, duly granted injunctive relief may extend to non-party agents, employees and others over whom the party enjoined has direct control, as they may be deemed to be constructive parties to the action and represented therein by their principals (*see* ***Ricatto v Ricatto***, 4 AD3d 514, 772 NYS2d 705 [2d Dept 2004]; ***Power Auth. v Moeller***, 57 AD2d 380, 395 NYS2d 497 [3d Dept 1977]).

Injunctive relief may not, however, be awarded to a litigant whose true objective is the attainment of relief in the nature of mandamus to compel or as a substitute for relief in the nature of prohibition, neither

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[1] The original petition (#013), which also appeared on the motion calendar of this court on November 20, 2009, was adjourned to December 18, 2009 and then to January 22, 2010 pursuant to 22 NYCRR § 202.8

of which remedy the litigant is entitled to under the controlling principles of law (*see* ***Grant v Cuomo***, 130 AD2d 154, 518 NYS2d 105 [1st Dept 1987]; *aff'd* 73 NY2d 820, 537 NYS2d 115 [1988]; ***Gaul v New York State Dept. of Envtl. Conservation***, 25 Misc3d 679, 884 NYS2d 314 [Sup Ct., Suffolk County, 2009]). That the remedy of prohibition is not available to forestall review of applications pending before a Planning Board because it does not act in judicial or quasi judicial capacity is clear (*see* ***Gasland Petroleum, Inc. v Planning Bd. of the Town of Beekman***, 50 AD3d 1039, 857 NYS2d 584 [2d Dept 2008]).

It is equally clear that to prevail on a motion for preliminary injunctive relief, the movant must clearly demonstrate a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d 460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court (*see* ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]), as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]). Consequently, a clear legal right to relief, which is plain from undisputed facts, must be established (*see* ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]). The burden of showing an undisputed right to the injunction rests within the movant (*see* ***Doe v Poe***, 189 AD2d 132, 595 NYS2d 503 [2d Dept 1993]).

Here, the record reflects that the Planning Board of the Town of Brookhaven was not named as a party respondent to this proceeding and that, to date, it has not been served with any process, pleadings or other papers in the manner required by CPLR 312. No claims for relief against the Planning Board were asserted in the original petition filed, served and noticed by the petitioner. Under these circumstances, the respondents' jurisdictional challenges to the petitioners' motion for preliminary injunctive relief are meritorious and are sustained by this court.

The respondents' further claims that the petitioners' demand for injunctive relief against the Planning Board are a thinly veiled attempt to obtain relief in the nature of prohibition are also meritorious, as such relief is not available against the Planning Board (*see* ***Gasland Petroleum, Inc. v Planning Bd. of the Town of Beekman***, 50 AD3d 1039, *supra*). The respondents also demonstrated that the petitioners are not entitled to preliminary injunctive relief under the traditional three prong test which requires a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position. The petitioners cannot demonstrate irreparable harm in the absence of the granting of the preliminary injunction requested, as the petitioners have an adequate remedy at law, namely, institution of an Article 78 proceeding if and when the Planning Board grants site plan approval to Sandy Hills. Nor can the petitioners establish a likelihood of success on the merits of any claims against the Planning Board since no claims, cognizable or not, were advanced by the petitioners in their original petition and leave to serve and file an amended petition containing cognizable claims against the Planning Board has not been granted herein to the petitioners. The petitioners' motion (#014) for preliminary injunctive relief restraining the Planning Board from undertaking review of the Sandy Hills' site plan application is thus denied.

Also denied is the petitioners' separate motion (#015) for an order pursuant to CPLR 401 and 1003 for leave to add the Planning Board as a necessary party to this action. In support of this motion, petitioners claim that the Planning Board is a necessary party to this action because complete relief cannot be accorded to the parties without such joinder. For the reasons set forth below, this court finds that the Planning Board is not a necessary party to this proceeding and that the petitioners have no ripe and cognizable claims against the Planing Board and are thus not entitled to the granting of leave to join the Planning Board as a party respondent and to serve and file amended process and pleadings so as to assert new claims against the Planning Board.

CPLR 1001 defines necessary parties as those who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by the judgment rendered. Here, the petitioners contend only that the complete relief may not be accorded to the parties originally joined herein in the absence of the joinder of the Planning Board. However, the claims asserted by the petitioners in their original petition are limited to challenging the actions of the Town Board in re-zoning the subject premises. They do not, in any manner, concern or involve the Planning Board or challenge action undertaken or about to be undertaken by it. It was only after the petitioners learned that the Planning Board would consider, in the regular discharge of its statutory duties, Sandy Hills' filed application for site plan review did the petitioners attempt to enlarge their claims so as to include claims sounding in prohibition and/or injunctive relief against the Planning Board to forestall its review of the site plan application. The court thus finds that the Planning Board is not an entity whose joinder is required in order to accord complete relief to the parties to this proceeding as presently constituted.

To the extent that the petitioners' motion (#015) may be considered as one for nunc pro tunc approval of the purported joinder of the Planning Board by petitioners' service of the amended petition that was attached to the August 19, 2009 Order to Show Cause (Kent, J.), it is denied. It is well established that where leave of court is required to join a new party defendant/respondent to an action or a special proceeding, service, without leave of court, of any supplemental summons or other process, such as a supplemental notice of petition, together with an amended pleading, is a nullity (*see* ***Perez v Paramount Communications, Inc.***, 92 NY2d 749, 686 NYS2d 342 [1999]; ***Public Admin. of Kings County v McBride***, 115 AD3d 558, 791 NYS2d 570 [2d Dept 2005]; ***Battle v Brookhaven Nursing Home***, 7 AD3d 553, 776 NYS2d 495 [2d Dept 2004]).

Pursuant to CPLR 401, leave of court is required to add new parties to any pending special proceeding. That an Article 78 proceeding is a special proceeding is clear (*see* CPLR 7804[a]). Leave of court to add a new party is thus required.[2] Although leave of court to amend a pleading in a *plenary action* so as to add claims against a new party defendant is not required when the amendment is made "as of right", or upon a stipulation of all appearing parties (*see* CPLR 1003), supplemental process in the form of a supplemental summons or supplemental notice of petition must be served upon the new party whose joinder was duly obtained pursuant to CPLR 1003 (*see* CPLR 305[a]). The failure to serve supplemental process in a manner contemplated by CPLR 305(a) leaves the court without jurisdiction over the proposed new party (*see* ***Gomez v City of New York***, 49 AD3d 473, 855 NYS2d 60 [1st Dept 2008]; ***Nikolic v Federation Empl. Guidance Serv., Inc.***, 18 AD3d 522, 795 NYS2d 303 [2d Dept 2005]).

Here, all parties characterize this proceeding as a hybrid Article 78/declaratory judgment action.[3] Nevertheless, leave to serve an amended petition to add the Planning Board as a party respondent/defendant to this action was not obtained by the petitioners prior to their service of the amended petition containing a new claim against the Planning Board that was attached to the August 19, 2009 order to show cause (Kent J.). Nor was supplemental process of the type contemplated by CPLR 305(a) ever filed and served upon the Planning Board in the manner required by CPLR 312. The petitioners' service of their amended petition was thus a nullity and their claims to the contrary are rejected as unmeritorious.

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[2] The fact that CPLR 7802 authorizes the court to direct that notice of the proceeding be given to any interested person and to allow intervention by any other interested persons does not obviate the requirement that parties to an Article 78 proceeding who seek to add new parties must obtain leave of court.

[3] In this regard, the court notes that this proceeding has none of the characteristics of a plenary action as the only process and pleading served in a jurisdictionally proficient manner was the notice of petition and petition in which the parties are styled solely as petitioners and respondents.

To the extent that the petitioners' motion (#015) may be considered as one for leave to add the Planning Board as a party defendant so as to assert claims against it by the filing and service of an amended pleading, it is considered under CPLR 3025, 1003, 305 and is denied. The standard for determining a motion for leave to amend a complaint is statutorily skewed in favor of a liberal granting of such relief (*see* CPLR 3025). An evidentiary showing of the meritorious nature of any one or more of the proposed new or amended claims is no longer required (*see* ***Lucido v Mancuso***, 49 AD3d 200, 851 NYS2d 238 [2d Dept 2008]; *see also* ***G.K. Alan Assoc., Inc. v Lazzani***, 44 AD3d 95, 840 NYS2d 378 [2d Dept 2007]; ***Trataros Constr., Inc. v New York City Hous. Auth.***, 34 AD3d 451, 823 NYS2d 534 [2d Dept 2006]). It is only where the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit is a motion for leave to amend properly denied (*see* ***Schofield v DeGroodt***, 54 AD2d 1017, 864 NYS2d 174 [2d Dept 2008]; ***Pelligrini v Richmond County Ambulance Serv., Inc.***, 48 AD3d 436, 851 NYS2d 268 [2d Dept 2008]; ***Lucido v Mancuso***, 49 AD3d 200, *supra*).

Here, the only demands for relief asserted in the proposed amended petition attached to the petitioners' motion for preliminary injunctive relief read as follows: "That the Brookhaven Town Planning Board acted without authority when it commenced site plan approval for the proposed Sandy Hill development and that the Planning Board be temporarily restrained stayed from any and all actions in the review and approval of the proposed 'Sandy' Hills development project". As indicated above, prohibition is not an available remedy against a Planning Board since it acts in an administrative capacity, not in a judicial or quasi-judicial one (*see* ***Gasland Petroleum, Inc. v Planning Bd. of the Town of Beekman***, 50 AD3d 1039, *supra*). The petitioners' proposed new claims sounding in prohibition are thus palpably insufficient to state a claim and wholly lacking in merit.

Equally lacking in merit are the petitioners' claims for a temporary restraint of Planning Board review of the Sandy Hills site plan application. Preliminary injunctive relief is available only in an action for permanent injunctive relief or where it appears that a defendant /respondent threatens, is about to do or is doing an act in violation of the plaintiff's rights and which tends to render the judgment ineffectual (*see* CPLR 6311). Here, neither scenario exists. While stays of further proceedings on or enforcement of an administrative determination at issue in an Article 78 proceeding are available under CPLR 7405, the same criteria necessary for the granting of preliminary injunctive relief is generally required to be shown by the party seeking the stay (*see* ***Melvin v Union College***, 195 AD2d 447, 600 NYS2d 141 [2d Dept 1993]; ***Lafiteau v Guzewicz***, 13 Misc3d 1228[A], 831 NYS2d 354 [Sup. Ct. Suffolk County, 2006]). As indicated above, the petitioners failed to demonstrate irreparable harm or a likelihood of success on the merits of any claim and they have advanced no claims for a stay under CPLR 7504. Since all of the proposed new claims against the Planning Board are palpably insufficient to state a cause of action and/or patently devoid of merit, the petitioners' motion for leave to add the Planning Board as a party respondent to this action is denied.

In view of the foregoing, the petitioners' motion (#014) for a preliminary injunction is denied as is the petitioners' separate motion (#015) for an order adding a new party respondent to this action.

DATED: 11/8/10

THOMAS F. WHELAN, J.S.C.